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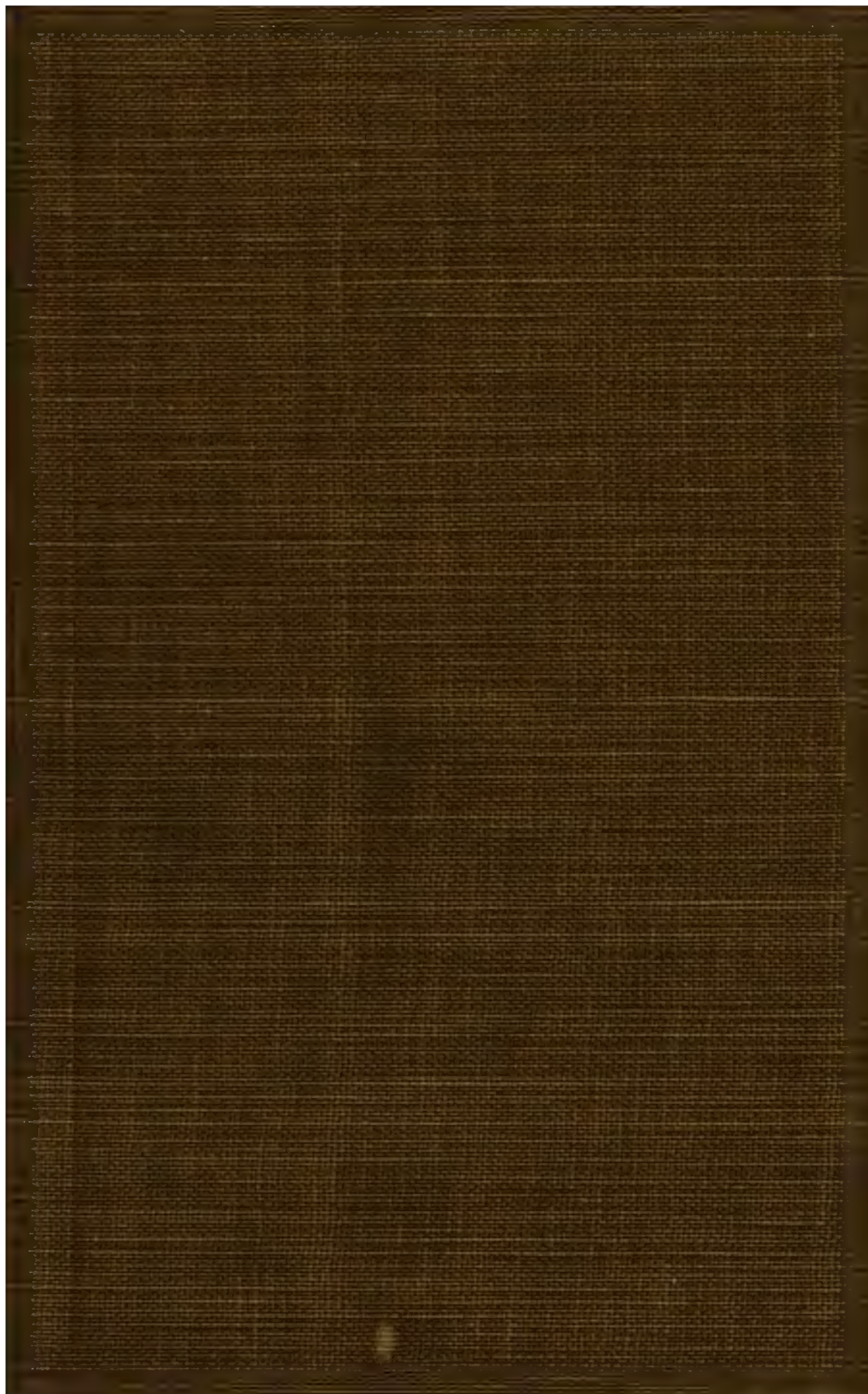
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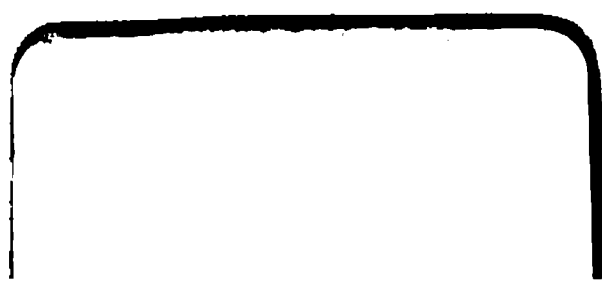
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THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

VOL. IV.

CHICAGO:
CALLAGHAN & COMPANY.
1884.

Entered according to Act of Congress, in the year 1884,

BY CALLAGHAN & COMPANY.

In the office of the Librarian of Congress, at Washington.

Stereotyped, Printed and Bound
by the
Chicago Legal News Company.

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MINING REPORTS.

VOL. IV.

HARTS ET AL. V. BROWN ET AL.

(77 Illinois, 226. Supreme Court, 1875.)

¹ Director may deal with corporation same as stranger—Deed of Trust.

A director or stockholder of a private corporation may trade with, borrow from, or loan money to the company of which he is a member, on the same terms and in like manner as other persons; but where a director loans money to his corporation, taking a deed of trust to secure the same, he must act fairly, and be free from all fraud and oppression; and if in so doing he acts for the interest of the company, and imposes no unfair or unreasonable terms, the security may be enforced the same as if given in favor of any other person.

Relation of director to company when purchasing its bonds or property. The managers or directors of a private corporation are not trustees of its property in such a sense as to disable them from purchasing the property and stock belonging to it, with the same effect as though they were not managers or directors. They have the right to purchase the bonds or other indebtedness of the company.

Idem—Purchase at foreclosure not in good faith, if company able to redeem. Where a corporation has money, or assets convertible into money, the purchase of its bonds or lien indebtedness by directors as a means of enforcing sale of its property would be in bad faith, and the title thus acquired would not be sustained in equity.

Purchase at foreclosure where company refuses or is unable to redeem. But where the company is insolvent or unwilling to pay or redeem after opportunity offered to all the stockholders to make advances and save the property, a sale under the security in such case is valid.

Duty of directors to dispose of remaining assets after loss of its substantial property. Where the essential and principal property of a mining company is sold under a trust deed securing its bonds, the company owing still other debts, it becomes the duty of the directors to dispose of the remaining property, and it may be so disposed of under the trust deed after sufficient has been realized under its foreclosure to pay the bonds secured.

Fiduciary purchasing at his own sale, after bidding off parcels sufficient to pay debt. When after sufficient parcels had been sold under a

¹ *Twin Lick Co. v. Marbury*, 3 M. R. 688.

trust deed to pay the debt secured the remaining parcels were knocked off at the same sale and bid in by the creditor, a director in the company: *Held*, that the sale of such parcels in excess was void because as to such property the directors were the vendors and they could not purchase at a sale made by their own authority.

Subrogation in such case. In such case where the receipts in excess of the debt secured, were used to pay off *bona fide* debts of the company, the parties paying such debts were entitled to be subrogated to the rights of the creditors paid, and such amounts allowed to them; but upon an accounting they should be charged with the full value of such parcels instead of the amount of the bids.

Appeal from the Circuit Court of Logan County.

Bill in chancery filed by Jefferson Brown and numerous others against David H. Harts, the Lincoln Coal Co. and others. The object of the bill and the material facts are stated in the opinion.

E. D. BLINN and ROWELL & HAMILTON, for appellants.

HOBLITT & FOLEY and NELSON & ROBY, for appellees.

By the Court, WALKER, C. J.

The Lincoln Coal Company was first organized in the year 1867, under the general incorporation law of this State, but afterward became incorporated under a special charter adopted at the session of the General Assembly of 1869. The stock was divided into five hundred shares of \$100 each. Three hundred were sold and paid for in full, but the remaining two hundred were apportioned among the stockholders according to the number of shares each held, upon their paying \$30 on each share. Three shares were subsequently forfeited, leaving four hundred and ninety-seven shares to represent the capital stock of the company.

The organization proceeded to sink a shaft, and to prepare for mining coal. The money received on the sale of shares of stock was expended, and debts to the amount of from \$23,000 to \$33,000 were contracted by the company. Bonds of the corporation were issued and sold to Musick, to the amount of \$9,400, and a trust deed was executed to him on

the property of the company to secure the payment of the same.

These bonds matured about the first of August, 1871, and the greater portion of them were held by Musick and Hall, who demanded payment, and refused to extend the time unless personal security was given. Prior to that time, the property had been sold under a decree for a mechanic's lien for \$2,000, and there was other indebtedness, as it is claimed, over the amount of assets to meet the same.

Thereupon the directors called a stockholders' meeting and the secretary gave each shareholder a notice thereof and of the object of the meeting. It was held on the first of September, when a portion of the stockholders attended, and the condition of the affairs of the company was laid before them, and a proposition was submitted that each shareholder contribute his proportion of the amount necessary to relieve the company from this indebtedness, and they were requested to severally pay such sums. The property was advertised and sold on the 23d of December, 1871, and Frorer became the purchaser, for the amount of the indebtedness of the company for the use of all stockholders who should join in forming a new company, and contributing thereto in proportion to the stock held by them in the old company.

Before this sale was made, Musick and appellants entered into a written agreement that he should sell and transfer to them forty-three and one third shares of stock, and assign to them fifty-two bonds of the company, of \$100 each with the interest thereon, and a promissory note executed by Frorer, Howser and Ezra Boren to Musick, for \$3,000 with ten per cent. interest; and that he would sell the property of the company, under and in conformity to the terms of the trust deed as soon as possible after the first of August, 1871, and to execute proper deeds therefor.

Appellants, on their part, agreed to execute to Musick four promissory notes—one for \$2,400 and three for \$2,500 each—and to execute a mortgage on their interest in the coal company's property, to secure the payment of the money. They were to keep Musick harmless on account of an agreement in reference to the note he assigned to them, and free from liability to the coal company.

After the property was sold and purchased by Frorer, appellants organized a new company, under the name of the Lincoln Coal Mining Company. They put in the property thus purchased at \$80,000 and divided the stock among themselves, and have been operating it with good profits and dividends ever since.

Appellees filed a bill against appellants and Musick, claiming that the sale was fraudulent and void; that the company had no power to make the trust deed to any one, and especially to a director of the company, and that appellants wrongfully combined to compel a sale of the property, and to become the purchasers, and thus defraud the other stockholders out of their interest in the property.

Musick filed a cross-bill, alleging that he was induced to sell his stock to appellants by false and fraudulent representations. Appellants claim that the company was hopelessly insolvent and without means to pay their debts and without credit, and that the property had been sold under a decree of court, and that the time for redemption would soon expire, and that, for the purpose of saving the means they had already embarked in the enterprise, they determined to become the purchasers, not at the sum due Musick, but at a price which would pay all the creditors of the company, and then organize a new company, giving to all the stockholders the opportunity to participate in the new organization by contributing their ratable proportion of the sum necessary to pay the purchase price they had paid for the property.

On a hearing, the court below dismissed Musick's cross-bill, but granted the relief sought by complainants in the original bill. The court decreed a rescission of the sale and stated the principles upon which an account should be stated, and referred it to the master to state the account. From that decree defendants prosecute this appeal, and assign various errors.

Had the directors legal authority to borrow money and to execute a trust deed for its security on the property, or a mortgage with a power of sale? Their charter authorizes them to contract and be contracted with; to sue and to be sued. And the eleventh section of their charter expressly confers the power to borrow money, and to issue notes or bonds for the same, secured by mortgage. See Private Laws, 1869, vol. 2, p. 837. This, then, places the power beyond all question.

Did the directors have power to borrow money of one of their number, and execute to him a mortgage on the corporate property, with a power of sale? We have never known it questioned that a director or stockholder may trade with, borrow from or loan money to the company of which he is a member, on the same terms and in like manner as other persons. He then had power to loan money to the company, and they became liable to pay the same. But in doing so, he must act fairly, and be free from all fraud and oppression; and he, in so doing, must act for the interest of the company, and impose no unfair or unreasonable terms.

In this case we perceive nothing unfair on the part of Musick. The company had expended all of their means, and had failed to realize their expectations, and had reached a point at which the enterprise must be abandoned unless means could be procured to further prosecute the work; and so far as we can see, there was nothing reckless or unbusiness-like in effecting this loan for the time, at the rate of interest or on the security given. They all seem to be according to the usual course of business.

The loan, then, having been fairly made, for a proper purpose and on reasonable terms, we fail to perceive any reason why the debt could not be collected by a sale of a sufficient amount of the property to raise the necessary sum; but it is urged that the other directors had no legal right to purchase the indebtedness held by Musick, and to have the property sold to meet the obligations of the company held by them. Angell and Ames on Corporations, p. 214, lay it down as a rule that "the managers or directors of a corporation are not trustees of its property in such a sense as to disable them from purchasing the property and stock belonging to it, with the same effect as though they were not managers or directors": and such is undoubtedly the general usage with the directors of all corporations. In this case, appellants had the right to purchase the bonds of the company, and Musick's stock and the \$3,000 note; nor does the purchase as made, raise a presumption of fraud, nor do we find any proven.

On the same grounds, and for the same reason, the purchase of the certificate of purchase, under the decree for the mechanic's lien, was legal, and was as effective as if it had been thus acquired by a stranger.

If the company had possessed money, or property, or any assets that could be converted into money, with which to redeem, and discharge the debts, then these purchases would have been in bad faith; but there were no such means—the company was hopelessly insolvent, and its final dissolution was at hand. The stockholders had been called together, and they were urged to make advances in proportion to the stock they severally held, and thus relieve the company and preserve its existence, but this they refused to do; and as it could not be preserved, and must come to an end by a sale under the power in the trust deed, no reason is perceived why appellants might not become the purchasers at the sale.

They were under no moral or legal obligation to advance their own means, pay the debts and preserve the property for the use of the other shareholders, who had declined to join in making *pro rata* advances to relieve it from debt. Appellants seem to have acted fairly, as they purchased at a sum sufficient to pay all the debts of the company. They chose to do so rather than make an effort to obtain all of the property for the debts secured by the trust deed and the certificate of purchase. On the contrary, they gave many thousand dollars more, that honest creditors might be fairly paid, and the company wrong no one. This does not have the appearance of fraud. Appellants had faith that the enterprise could be carried out with success, and that they could thus save the means they had advanced; but appellees, by the course they adopted, manifested an entire want of confidence in its ultimate success. They were even offered the opportunity to come in, for a considerable period afterward, and share in the new enterprise, by advancing a ratable portion of the means, but they all declined; but when success was achieved, they then saw the advantages they had lost, and then sought to set aside the sale and have the property restored to the old company, and thus reap the benefits arising from the enterprise and means advanced by others. To do so, they should show fraud, or a want of power to make the sale or the purchase by appellants, neither of which has been done.

It is next urged that the sale is excessive; that when property sufficient to pay the bonded indebtedness had been sold,

the sale should have been stopped. The first offered and sold were the lands, shaft, railroad tracks, rails and mining rights, etc., which were bid in at \$11,000, which, it is contended, brought \$70 more than the bonded debts. Conceding this to be true, still the principal thing was gone—the land, shaft, railroads and mining rights. The remaining property was but mere chattels, and could not be used by the company for the purposes for which they were acquired, unless other coal lands had been acquired and a new enterprise undertaken.

When the company had thus been reduced to this situation what was the plain moral and legal duty of the directors? Surely, every person would, without hesitation, say, sell the remainder of the property and pay the debts of the company. This was dictated by every principle of justice and right. To have done otherwise would have been unjust and indefensible.

There can be no doubt that the directors had the power to sell the property, either at public auction or at private sale: or, if they chose, they could, as they did, authorize Musick to sell it at auction. In this there is no lack of power; but the question is, whether they could become purchasers at their own sale. Until the bonded debts were satisfied, the sale was that of Musick for the benefit of the holders of the bonds, forty of which belonged to other parties than appellants; but when the sale amounted to a sufficient sum for that purpose, all that was subsequently sold was by Musick as the auctioneer of appellants, and they purchased at their own sale. This they could not do, any more than they could fix a price on the property and appropriate it to their own use, which the law has never sanctioned with persons occupying the relation they did to the stockholders. The sale, then, of property over and above what was necessary to pay the bonded indebtedness, was void, inasmuch as it was purchased by the directors of the company.

But inasmuch as appellants have paid large sums of money to satisfy and discharge the indebtedness of the corporation, they have, in equity and at law, a right to have their money refunded; and in equity they should be subrogated to the rights of the creditors whose debts they have paid, and should, in the final settlement and accounting with the stockholders, have a credit for the sum thus paid; and they should be re-

quired to account for all property sold by Musick after he had sold a sufficient amount to pay off and discharge the bonds, at its value as may be shown by evidence to be heard on the question, and if the property was of greater value than the amount paid by them on the debts, the balance should be treated and held as a fund for distribution among the stockholders in the original company; or if the first company is in existence and the shareholders desire to continue the organization, appellants should be required, after deducting their proportional share according to the amount of stock held by them, to pay over the remainder of such surplus to the directors of the original company. Appellees have resorted to equity to obtain their rights, and they must be required to do equity; and the distribution of the fund in the manner indicated, is equitable and just.

The decree of the court below is reversed and the cause remanded.

Decree reversed.

ABBOTT V. OMAHA SMELTING AND REFINING CO.

(4 Nebraska, 416. Supreme Court, 1876.)

¹ **Partnership attempting to prove corporate organization.** Where one of an association of persons, charged as partners, seeks relief from liability on the ground that such association is a corporation legally organized and doing a corporate business, the burden of proof rests on him to show the existence of such corporation. Failing to establish it, he can not avoid liability on the ground that he does not appear as a subscriber to the capital stock of such association. And the question in such case is not so much, whether such person has held himself out as a partner, but whether he was a member of the company, assuming to act as a corporation—holding himself out to the public, using his name and engaging in its transactions as such.

Proof of organization or charter. To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown.

Filing articles. In Nebraska, the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any cor-

¹ *Trowbridge v. Scudder*, 3 M. R. 471.

porate franchise. The law and articles so filed, taken together, are considered in the nature of a grant from the State, and constitute the charter of the company.

This was a petition in error to reverse a judgment against S. C. Abbott, for the sum of \$2,792.18 in the District Court of Douglas county. He was sued there, with several others as copartners, under the firm name of The Register Smelting and Refining Company, and on the trial asked the court to instruct the jury as follows:

1. Unless the jury believe from the evidence that Abbott held himself out to the public or plaintiff as a partner in the alleged company, or that he was entitled to receive a part of the profits, and bear a part of the losses, if any, they must find for the defendant.

2. That it is not sufficient of itself to charge Abbott as a partner to show that his name was used as president of the alleged company, unless it further appears that he was entitled to receive a part of the profits and share the losses.

3. The jury are instructed to find for Abbott, upon the issues joined in the pleadings.

These instructions were refused by the court, and evidence offered by Abbott in defense of the claim set up against him, as one of said partners, excluded. Further facts appear in the opinion.

E. WAKELEY and CLINTON BRIGGS, for plaintiff in error.

GEORGE E. PRITCHETT, for defendant in error.

GANTT, J.

The defendant in error, The Omaha Smelting and Refining Company, sued the plaintiff in error and others as copartners, doing business under the name of The Register Smelting and Refining Company, to recover the balance of an account, claimed to be due and owing to it from the plaintiff and others upon business transactions between them. The plaintiff and one Josslyn were the only parties served with process. The plaintiff in error answered the petition, and denied the copartnership or that he ever became indebted to the defendant in error in any sum whatever; but alleged that by virtue of articles of incorporation entered into by the

plaintiff and others, they did, under the general laws of this State, become a corporation under the name of The Register Smelting and Refining Company, elected officers, and as such corporation transacted business, and that the defendant in error dealt with them as such corporation—each company acting in a corporate capacity in the transaction of the business between them.

The proper reply was filed to this answer.

The main ground of defense to the action is, that The Register Smelting and Refining Company was a corporation, doing business as such, and was so recognized by the defendant, and therefore the action can not be maintained against the plaintiff in error, and others, as copartners. It is, however, admitted that the company did not file and have recorded in the office of the county clerk, articles of incorporation. But it is insisted on the part of plaintiff in error that the organization of the company, in all other respects, was in conformity with the requirements of the law; that it transacted its business as such corporate body, and therefore it became and was a corporation *de facto*, if not *de jure*. And the plaintiff now complains, first, that the court below erred in excluding from the jury, evidence tending to show that the defendant in error dealt with and recognized The Register Smelting and Refining Company as a corporation, and gave credit to it as such; and second, that the court erred in excluding from the jury evidence tending to show that the plaintiff in error was not a stockholder in the company. These two assignments may be considered together, for if the court erred in excluding the evidence offered in the first assignment, then the evidence offered in the second was improperly excluded; and the converse of the propositions is equally true.

In the discussion of these questions it must be borne in mind that it is the plaintiff in error who asserts that the company was a corporation, and was doing business as such corporate body; and therefore the burden of proof rests on him to show that the company was a corporation either *de jure* or *de facto*; but as above stated, it was admitted on the argument of the case that the company was not a corporation *de jure*. Then, was the company a corporation *de facto*? I think, in order to establish such a corporation, it is necessary to show user

of a corporate franchise by an association of persons, though the organization may be so defective as to render the franchise wholly invalid in a proceeding against it by the State; or in other words, it is necessary to show the existence of a charter, or some law under which the assumed powers are claimed to be conferred, and the user of the franchise claimed under such charter or law. In *Buffalo R. R. Co. v. Cary*, 26 N. Y. 77, it is said that, "if the papers filed by which the corporation is sought to be created are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet, by acts of user under such organization, it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution collaterally by any person." This doctrine seems to be founded upon the principle, that the existence of such corporation acting under color of a franchise, can not be questioned in a suit where it would only arise collaterally, because the State, the party chiefly concerned, could not be heard by counsel.

In the case referred to, the company had its "papers filed," and acted under color of a franchise. A franchise as used in relation to corporations, means certain privileges conferred by government on individuals, which do not belong to the citizens of the country of common right: Angell and Ames on Corp. § 4; *Bank of Augusta v. Earle*, 13 Peters, 595.

Hence, if the acts and proceedings of a company or association consist only of such acts and proceedings as might be performed without an incorporating act, or corporate grant or franchise, a corporation can not be inferred from such acts: *Green v. Dennis*, 6 Conn. 302.

Now had The Register Smelting and Refining Company secured any franchise whatever, under color of which it could act as a corporation *de facto*? I think the evidence offered does not show any such corporate existence. The right, however, is claimed under the general incorporation law of the State. Section 123 of the statute provides, that "any number of persons may be associated *and incorporated* for the transaction of any lawful business, including the construction of canals, railways, bridges, and other works of internal improvements." Two things are included in this provision; the persons may associate, unite together and then they may be incor-

porated, and become a body corporate for the transaction of any lawful business. And hence, it seems to me that the sense in which the word "organization" is used in section 126, means simply the process of forming and arranging into suitable disposition the parts which are to act together in, and in defining the objects of the compound body, and that this process, even when completed in all its parts, does not confer the franchise, either valid or defective, but on the contrary, it is only the act of the individuals, and therefore something else must be done to secure the franchise. Therefore, section 126 provides that the "corporation, previous to the commencement of *any* business except its own organization, * * must adopt articles of incorporation and have them recorded in the office of the county clerk of the county, or counties in which the business is to be transacted"; but section 132 permits the "commencement of business as soon as the articles of incorporation are filed by the county clerks of the counties, as required by this subdivision."

The purpose of the statute is to confer the right of franchise, or the powers of a corporation without charter, by direct legislative enactment, and to attain this object, it provides that the company must adopt articles of association and must file and have them recorded in the office of the county clerk. These requirements are expressed in affirmative language, and in *District Township v. The City of Dubuque*, 7 Iowa, 276, it is said, that "affirmative expressions that introduce a new rule, imply a negative of all that is not within the purview." Now, if the articles of incorporation are not filed in the office of the county clerk, the parties acting in the matter do not bring themselves within the purview of the statute, because the filing of the articles as required is a condition precedent to the existence of the corporate franchise or corporate powers in any respect whatever; this prerequisite, I think, must be complied with. The general law under which the association is formed and the articles of incorporation adopted and filed as required, taken together are in law considered in the nature of a grant from the State and as the charter of the company. If the mere act of organization by the individuals, conferred the corporate franchise, why should the statute require the articles to be filed and recorded in the office of the county clerk

as a prerequisite to corporate existence? *Eastern Plank Road v. Vaughan*, 14 New York, 546; *Welland Canal v. Hathaway*, 8 Wend. 480; *Central T. Corp. v. Valentine*, 10 Pick. 142; *Schenectady Co. v. Thatcher*, 11 New York, 102. And if the filing of the articles is not a condition precedent, why is it provided in section 139, that a failure to comply, substantially, with the provisions in relation to giving notice and the requisites of organization, should make the property of stockholders liable for the debts of the corporation and not make them liable on failure to file the articles? Perhaps the only satisfactory answer to the question is that, according to the legislative intent, no corporate franchise or power exists until the articles are filed as required.

. In *Mokelumne Co. v. Woodbury*, 14 Cal. 427, where the statute provided for the filing of a certificate in the office of the county clerk, and a duplicate thereof in the office of the Secretary of State, it was held that upon filing the certificate in the clerk's office, the right of corporate privileges vested in the association, and upon failure to file a duplicate in the office of the Secretary of State, the assumption of corporate powers amounts to a usurpation of the sovereign rights of the State: the remedy for which is a direct proceeding on the part of the State; but the court say, "the general rule is that the existence of a corporation may be proved by producing its charter, and showing acts of user under it; but this rule has no application to a corporation founded under the provisions of the general statute, requiring certain acts to be performed before the corporation can be considered *in esse* or its transactions possess any validity. The existence of a corporation thus formed must be proved by showing a substantial compliance with the requirements of the statute. But there is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only

to the government in a direct proceeding to forfeit the charter. The right of the plaintiff to be considered a corporation, and exercise corporate powers, depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence": *Field v. Cook*, 16 La. Ann. 153. And it is said that persons who have contracted in writing with such an association, without any color of franchise, are not estopped from denying its corporate capacity: *Welland Canal v. Hathaway*, *supra*; *Williams v. Bank of Mich.* 7 Wend. 539; and again, that the associates of such company assuming corporate powers, are to be treated as partners: *Hill v. Beach*, 1 Beas. Ch. (N. J.) 31.

From these considerations, it seems clear to me, that when persons organize as an association for the transaction of business—assuming to be and acting together as a corporation without any color of a corporate franchise, if any one of the members of such organization could escape responsibility on the ground that he does not appear as a subscriber to the stock of the concern, it might open the door to great fraud upon the public. It would enable him to furnish capital for the concern, to receive profits of the same, to act as a member thereof, and to control and direct the business affairs of the company as an officer, or otherwise, and by the use of his name in such way as to secure to the company the confidence and credit of the public; and yet, upon a failure of the enterprise, he would escape personal liability on the ground that he does not appear as a stockholder in the concern, and claims to be a creditor of the same. Such a system of business will not bear the test of ethical criticism; it may be fraught with great fraud upon the public, and certainly the law will not sanction it.

Now, if I have given a correct interpretation of the law of the case, then the question of fact to be found by the jury under the proofs is, not so much whether the plaintiff held himself out to the public as a partner in the concern, or whether he was to receive part of the profits or share part of the losses; but whether he was a member of the company, assuming to act as a corporation—holding himself out to the public—using his name, and engaging in its business transactions as such member of the concern. The plaintiff having utterly failed to

show that the company had any corporate existence, the evidence offered was properly rejected; and the instructions requested to be given to the jury on the part of the plaintiff and refused by the court, are inconsistent with this exposition of the law, and therefore, although as abstract propositions of law they may be correct, so far as they go, yet for the reasons given, I think they tended to mislead the jury in this case.

The court, however, instructed the jury that in order to justify a recovery against the plaintiff in error, "the burden is upon the plaintiff (now defendant in error) to establish by a preponderance of evidence the elements necessary to make a partnership between Abbott and some or all" of the parties sued; and further, that "if he, Abbott, were a member of the concern styled The Register Smelting and Refining Company, with which the plaintiff (now defendant in error) transacted the business, or if he held himself out as such, as president or otherwise, he is liable in this action." The question of fact for determination by the jury seems, therefore, to have been fairly submitted to them by these instructions; and the instruction asked by the defendant in error, and excepted to by plaintiff, is substantially the same as those given by the court as above stated, and constitutes no sufficient ground for disturbing the judgment.

Judgment affirmed.

¹BONNELL V. GRISWOLD ET AL. BLAKE V. GRISWOLD
ET AL.

(68 New York, 294. Court of Appeals, 1877.)

Distinction between liability for no report and false report. Assuming that under the laws of New York, causes of action against the trustees of a corporation for omission to file an annual report, and for making and filing a false report, may be united in one complaint, and that a false report may be regarded as no report; yet, to justify such union each cause of action must affect all the parties. For the omission, all the trustees are liable. For the false report, only those are liable who do the act.

¹ Reported below, 3 T. & C. 557.

Demurrer—Complaint qualified by exhibit. H., one of the defendants, demurred to a complaint which alleged that the defendants made and filed a report, a copy whereof is hereto annexed, and that defendants signed the report knowing it to be false. The annexed copy did not purport to be signed by H. *Held*, that by demurring, H. did not admit that he signed the report, but that the general averment in the complaint that defendants signed, was limited by the copy annexed to those who appeared by it to have signed.

Facts, but not conclusions of law, are admitted by a demurrer.

Appeals from the General Term of the Supreme Court,
Third Judicial Department.

The judgments of the Supreme Court were in favor of the defendants, Wheeler, Griswold and Hoysradt, reversing the orders of the inferior court by which their demurrers to the complaints in both of the above entitled causes had been overruled. The Supreme Court directed judgments for the defendants upon the demurrers.

The actions were substantially alike. They were brought by plaintiffs as creditors, against the defendants as trustees, of "The Iron Mountain Company of Lake Champlain," a corporation organized under the general manufacturing act: Chap. 40, Laws of 1848.

The substance of the first count in each of the complaints was, that defendants and John A. Griswold, deceased, were trustees of said company, and that they omitted to make, publish and file an annual report within twenty days after January 1, 1870.

The second count alleged that "the defendants and said John A. Griswold, on the 13th day of January, 1870, made and filed * * a certificate or report, a copy whereof is hereunto annexed, marked B, and the said defendants and said John A. Griswold published said certificate or report. * * That said report was false in a material representation; * * that said defendants and the said John A. Griswold signed said certificate, knowing it to be false, as hereinbefore stated."

The copy annexed commenced thus: "We, George M. Wheeler, John A. Griswold, Chester Griswold and C. D. Schubarth, being trustees of the Iron Mountain Company of Lake Champlain, and a majority thereof, and the said George M. Wheeler being president of said company, do hereby cer-

tify and declare," etc. It was signed by the four trustees so named in the body and by no others.

There was a third count which is not considered in the opinion and hence not reported.

The defendants first named demurred upon the grounds that the two causes of action were improperly united, for the reason, among others, that the second cause of action did not affect all the parties to the action, as defendants Hoysradt, Corning and Burleigh did not sign the certificate therein referred to.

A. POND, for appellant.

WM. C. HOLBROOK, for respondents.

PER CURIAM.

Assuming, without deciding, that causes of action against trustees of a corporation under the twelfth and fifteenth sections of the Manufacturers' Act referred to, may be united in one complaint, and that a false report may be regarded as no report, yet in order to justify such union, each of the causes of action must affect all the parties to the action: Code, § 167. For an omission to file any report, all the trustees are liable, jointly and severally to the creditors; for making and filing a false report, only such of the trustees as do the act are liable. The language of the act is "all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable."

The contention is, whether the complaint should be construed as alleging that all the defendants, including Hoysradt, signed the report alleged to be false. The allegation is, that the defendants and said John A. Griswold, on the 13th day of January, 1870, made and filed "* * a certificate or report, a copy whereof is hereunto annexed, marked B." Also, "that said defendants and John A. Griswold signed said certificate knowing it to be false," etc. The copy annexed purports to be signed by Griswold and three of the defendants, and not by Hoysradt, Burleigh or Corning. The body of the certificate

shows that it was made only by the persons who signed it. It commences "We," followed by the names of the persons who signed the instrument. We think that by annexing a copy of the alleged report to the complaint referring to it, together with the intrinsic evidence furnished by the copy itself, the general allegation of the complaint is qualified so as substantially to aver that the defendants, whose names appear upon the copy, actually signed the same, and it follows that the defendant Hoysradt did not, by demurring, admit the fact that he signed the report, nor did the other defendants, by demurring, admit the fact. Facts and not conclusions of law are admitted by a demurrer. Averments as to the meaning of a contract set forth in a complaint are not admitted by a demurrer:¹ 21 Wall. 430.

The question here is, what was the fact alleged? And we think the allegation is, that the defendants who purport by the copy annexed to have signed, did in fact sign. There is an inconsistency in the two allegations. The general allegation that the defendants signed, etc., would include all the defendants; but the additional allegation that the defendants signed, as appears by a copy of the instrument hereto annexed, qualifies and limits the general averment to those appearing to have signed, by the copy.

It is not the case of an allegation of signing, a proper copy of which is given without any signature. Here the copy purports to contain the names of the persons who signed the paper in the body of it, and also the signatures. There is no room for intendment that other signatures were affixed, and hence it can not be presumed that there was an intention to aver others. The authorities cited by the counsel for the appellants are not inconsistent with these views. In *Paige v. People*, 6 Park. 683, the question was, whether the forging of a sealed instrument was averred in the indictment, and it was held that it was, under the averment of the forging of a deed which *ex vi termini* imports a sealed instrument. WOODRUFF, J., remarked that the copy set out with the letters L. S. was not a sufficient allegation that it was under seal. In 40 Barbour, 164, it was held that an assignment of all property

¹ *Dillon v. Barnard*.

of the assignor would convey property not specified in the schedule referred to.

These cases do not meet the case at bar for the reasons before stated, and without further elaboration, we concur with the opinion of MILLER, J., in the court below upon this and other points involved.

The judgment must be affirmed, with leave to plaintiffs to amend complaint, within twenty days after service of notice of entry of remittitur on payment of costs.

All concur; MILLER, J., not sitting.

Judgment accordingly.

THE FLAGSTAFF S. M. Co. OF UTAH, LIMITED, v.
PATRICK ET AL.

(2 Utah, 304. Supreme Court, 1877-1880.)

Agent enjoined. When a corporation holds possession of its property by an agent, and such agent is discharged, and the possession of such property is taken by another agent duly authorized. *Held*, that if the possession of the latter is threatened by the former the discharged agent will be enjoined by the corporation from any interference with the possession

Removing agent, no change of possession. The possession of the property of a corporation by its agent is the possession of an agent for his principal, and the removal of such agent and the entry into possession thereof by a new agent is not a change of possession.

Agent holds at pleasure of principal. It is a general doctrine that an agent holds his authority at the pleasure of his principal, and the only exception to the rule is when the power of attorney held by the agent is coupled with an interest in the property, founded upon a valid consideration.

¹ **Powers of board of directors.** When by the articles of incorporation it is provided that the board of directors shall have power to appoint and remove the agents of the corporation, the power thus given is a trust reposed in the directors alone, and they are not at liberty to enter into any agreement by which such power is surrendered to a stranger.

² **Removal of agents.** The power to appoint and remove agents and the managers of the affairs of an incorporation, rests with the company itself and can not be shifted or transferred by any contract made by the board of directors.

Ultra vires. A corporation is not bound by an unauthorized contract made

¹ *Carey v. Philadelphia Co.*, 1 M. R. 349.

² *Davis v. Flagstaff Co.*, 2 M. R. 661.

by its board of directors; such contract can be treated as *ultra vires* and is not binding upon the corporation.

Allegations on information and belief. Under section 113 of the Practice Act the allegations of a complaint can be made on information and belief.

Injunction to prevent interference with possession. Where there is a well grounded fear that a discharged agent of a corporation will use force to repossess the property in charge of its duly appointed agent, a court of equity will protect such possession by injunction.

Appeal from the Third Judicial District Court.

The plaintiff was a mining corporation, organized under the "Companies Act" of 1862 and 1867, of the Kingdom of Great Britain, and its board of directors ordered the secretary to enter into a contract in its behalf with Erwin Davis, one of the defendants, by which it agreed to appoint defendant Patrick, agent and manager of all its mining property (which was situated in Utah Territory), and for his retention in that position, until out of the profits of the workings of the property, its said manager should pay to Davis certain moneys then claimed to be due him from the corporation. By the terms of this contract Patrick was removable at the pleasure of Davis. Davis reserved in the contract his right to proceed against the corporation for his debt.

Patrick had under this contract received a power of attorney from the corporation, and acted as its agent and manager for about three years, at which time the corporation assumed to remove Patrick and appoint one A. G. Hunter as its agent, who by means of the arrest of one of the principal men at the mine on some charge, obtained possession of the mine and ousted the Patrick management, and refused to recognize any right of possession either in Patrick or Davis, or any obligation of the contract, claiming it to be void. Patrick and Davis, it was alleged, threatened to play the same tactics as Hunter did in getting possession of the mine, in order to regain the possession, whereupon Hunter being in possession commenced this action in the name of the company to quiet the possession.

The other facts are stated in the opinion of the court.

BASKIN & DEWOLF and HEMPSTEAD & GAMBLE, for appellants.

The grounds upon which the plaintiff in the complaint predicates its right to an injunction, are stated on information and belief.

A traverse of allegations made on information and belief raises no triable issue: *Baskin & De Wolfe v. Godbe*, 1 Utah, 28; High on Inj., §§ 36, 986, 987.

The complaint alleges fraud in general terms, without specifying the facts constituting the fraud.

Fraud is a conclusion of law, and if the facts showing fraud are not set out, the evidence to prove fraud is inadmissible: Kerr on Fraud, pp. 365-366; High on Inj., § 28.

Equity will not lend its aid to one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage: *Bein et al. v. Heath*, 6 How. 247; Broom's Legal Maxims, t. p. 545-547.

The plaintiff's possession was obtained by wrongful and unlawful means: See evidence and § 1196, p. 392, and § 2066, p. 616, Revised Statutes.

The contract between the plaintiff and Davis set up in the answer did not require the seal of the Flagstaff Company to make it valid and binding: § 37 Amendment of Companies Act, 30 and 31 Victoria, c. 131; *Cook v. Corporation of Seaford*, 10 Chancery, 678; Ang. & Ames on Corp. § 219, and cases cited; Addison on Cont. § 122; 4 Kent's Com. 451, note K.

Section 20 of said articles limits this general power in this: it prohibits the company from borrowing on mortgage or debentures, either transferable or to bearer, any sum exceeding one hundred thousand pounds, and the board from borrowing without the sanction of a general meeting, on like securities or on bills of exchange, any sum exceeding ten thousand pounds.

As the advancements by Davis were not made on mortgage, debentures or bills of exchange, the transaction was not in violation of the articles, but was authorized by the general powers of the company, which section 20 does not limit but leaves in full force: *Agar v. Athenæum Ass. Soc.*, 3. C. B. (N. S.) 725-750; see *Fay et al. v. Noble et al.*, 12 Cush. 1; *Campbell v. The Merchants', etc.*, 37 N. H. 41.

In regard to the objects of its creation it has the same

power as a natural person, and may do any act which an individual could do in relation to similar objects, unless restricted by statute or charter: Angell & Ames on Corp. §§ 110, 6, 2 and 4; *Smith v. R. R.*, 27 N. H. 94; *Dana v. Bank of U. S.* 5 Watts & S. 243; *Bank of U. S. v. Dandridge*, 12 Wheat. 64.

It is well settled that an agency coupled with an interest, either in favor of the agent or a third party, if recognized or acted on by such third party, is irrevocable: Story on Agency, §§ 476, 477; 2 Story's Equity Jurisp., §§ 1041, 1042.

It therefore follows that any act in violation of said articles may be ratified, and even if the contract between plaintiff and Davis was (as it is not) *ultra vires*, Davis having performed all of the conditions of the same on his part, and the plaintiff having received, used in its business and retained large sums of money under said contract, and having recognized and acted under the same for three years is estopped as an individual would be under like circumstances, from denying the validity of said contract, and is bound by the same: *Bradley v. Ballard*, 55 Ill. 413 (8 American Rep. 656); *Bissell v. Michigan Southern R. R.*, 22 N. Y. 258; *Parish v. Wheeler*, Ibid. 494; *Argenti v. San Francisco*, 16 Cal. 256; *San Francisco Gas Co. v. City*, 9 Cal. 453; *Fause v. Wines*, Hopkin's Chan. 322; *Steam Navigation Co. v. Weed*, 17 Barb. 380, and cases cited; *Moss v. Lead Co.*, 5 Hill, 137; *Hale v. The Union Mutual Insurance Co.*, 32 N. H. 295; *Moran v. Commissioners*, 2 Black, 722; *State Board v. Citizen's Street R. R.*, 47 Ind. 407; 1 Addison on Confs., § 124, Ib. 3 vol. p. 410; *Township of Pine Grove v. Talcott*, 19 Wall. 679; *City Fire Insurance Co. v. Carrugi*, 41 Ga. 660; 2 U. S. Dig. (New Series), 174, § 80; *Backman v. Charleston*, 42 N. H. 125; *Agar v. Athenæum Ass. Soc.*, 3 C. B. (N. S.) 725-750; *Royal British Bank v. Turquand*, 5 Ell. & B. 248; *Royal British Bank v. Turquand*, 6 Ell. & B. 327; Lindley on Partnership, 202, 207-212; *Phosphate of Lime Co. v. Green*, 1 Moak, 98; *Gordon v. Preston*, 1 Watts, 387.

A party can not rescind a contract even for fraud, without restoring the other party to the same condition that he would have been in had the contract not been made, and if the party injured chooses to rescind, he must do so at once on discover-

ing the fraud, otherwise he ratifies the contract and is bound thereby: 2 Parsons on Contracts, p. 679, *note A*, 780-786, and cases cited; *Cobb v. Hatfield*, 46 N. Y. 533; Kerr on Fraud, 47; many cases might be cited to the same effect.

Under the law and the facts disclosed, the court should, by mandatory injunction, restrain the plaintiff from further interfering with the discharge, by Patrick, of his trust under said contract, pending the litigation; thereby restoring the parties to the condition which they occupied at the time the plaintiff restored to force and the unwarranted use of criminal process to enforce a right which the courts alone had the right to determine or enforce. As to the power of the court to issue such an injunction, see High on Inj., §§ 2, 478; Hilliard on Inj., p. 39, § 31; Adams' Equity, p. 428; *Rankin v. Huskisson*, 4 Sim. 16; *Lane v. Newdigate*, 10 Ves. 192.

SUTHERLAND & McBRIDE and ROSBOROUGH & MERRITT, for respondents.

The complaint makes out a sufficient case under § 254, Pr. Act. It sets up plaintiff's title in fee and possession of the mine, which are admitted, and that defendant, Davis, claims an adverse interest in the property, and asks that the same be determined. § 254 enlarges the class of cases in which equitable relief could formerly be sought in quieting title: *Curtis v. Sutter*, 15 Cal. 259; 32 Cal. 109.

The allegation upon information and belief is sufficient under § 113, Pr. Act.

There has been no change of possession of the mine. The Flagstaff Company has been in possession of it more than three years; there was only a change of managers or agents of the company.

But, even if the entry had been forcible and wrongful, a court of equity will not grant the injunction sought against the plaintiff: 50 Ill. 459; 32 Cal. 109.

On the facts of this case, however, there was no force. On this subject see 45 Cal. 677; 45 Cal. 673; 38 Cal. 422.

But appellants insist that the alleged contract of December 16, 1873, created a lien upon the mine or unsevered ore therein in favor of Davis, and a trust for its enforcement, and took

from the company its corporate power of appointment on a motion of its chief executive officer, and invested that power in Davis, and that the court ought now to exercise that power by imposing Patrick still as manager.

The contract with Davis is *ultra vires*, because it takes away from the company the power to appoint and remove its chief officer. The manager of an English mining corporation is its most important officer, and holds in his hands its property, its credit and all its chances of success. The power of appointment and removal of officers is necessarily incident to every corporation: Angell & Ames on Corp., §§ 110, 433-4; 2 Kente, 297; Grant on Corp. 243; *Neall v. Hill*, 16 Cal. 145; *Atty. Gen. v. Earl of Clarendon*, 17 Vesey, 491; *Bayless v. Orne*, 1 Freeman Ch. R. 171; Plaintiff's By-laws, § 33.

How can the court then grant the relief asked in this case? By ousting the present manager and remitting a discharged agent? Such a proceeding would be to decree a dissolution of the corporation: 17 Vesey, 491; 1 Freeman Ch. R. 171; *Neall v. Hill*, 16 Cal. 145, *supra*.

A corporation is not bound by acts of its directors or officers, *ultra vires*, and such acts are not capable of ratification in any case where the power to act or contract in the particular matter does not exist: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Martin v. Same*, 38 Cal. 300; *Zottman v. San Francisco*, 20 Cal. 96.

It is admitted that a corporation may, in its ordinary business concerns, make contracts not under seal; but the rule has always been and still is, that in conveying land, or creating an interest in, or charge or lien upon land, the contract of a corporation must be under its corporate seal: Angell & Ames on Corp., § 219; 5 East, 240; 8 East, 228; 2 Cranch, 166; Grant on Corp. 147; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; 1 Parsons on Con. 140-1; Lindley on Part. 287.

The contract is illegal and void, having been entered into for fraudulent and illegal purposes, and in violation of the by-laws and charter of the company: Art. Association, § 20; Affi't of Hunter, Tr. p. 61-2; *Pearce v. Madison R. R.*, 21 How. 442; *Martin v. Zellerbach*, 38 Cal. 300.

Parties dealing with directors of a corporation as well as those dealing with any other agents, are bound to take notice

of their authority. The plaintiff has no power to create an obligation by borrowing money, except in the modes prescribed by its charter, and the law never implies an obligation to do that which it forbids the party to agree to do: 20 Cal. 104-5; 5 Denio, 567; Lindley on Part. 201; Addison on Cont. § 124.

BOREMAN, J., delivered the opinion of the court.

The respondent (plaintiff below), a mining corporation organized and existing under the laws of Great Britain, made, through its directors, a contract with Erwin Davis, one of the appellants, for the appointment of J. N. H. Patrick as agent and manager of the company's properties and business in Utah, and for Patrick's retention in the position until out of the profits of the mine Patrick should repay to Davis moneys advanced to the company, and until Patrick should mine and deliver to Davis, and smelt certain ores. By the terms of this contract, Patrick was, for an indefinite time, removable at the pleasure of Davis, but could not be removed by the company. It further provided that Davis could appoint a successor to Patrick, and Davis expressly reserved all of his rights to proceed against the company for the non-payment of the money to be advanced the company and for non-delivery of the ores sold to him. The company at the same time executed to Patrick a power of attorney to attend to all of its business in Utah, and to take charge of all its properties in Utah.

After this contract with Davis and this power of attorney to Patrick had existed about three years, the respondent (the company) assumed to remove Patrick and appoint as its agent in his stead, Andrew G. Hunter. Hunter arrived here, and Patrick being out of the Territory, he (Hunter) applied to Patrick's foreman (George Cullen) at the Flagstaff mine, the property of respondent, for possession, and possession was refused him. He thereupon has Cullen arrested as a trespasser and then entered into possession of the company's property, the other employes at the mine recognizing his authority to represent the company. The company then bring this suit, alleging that Patrick and Davis are out of the Territory, but that Cullen and Walker, the other two defendants, acting for Patrick and Davis, threaten to seize the mine in dispute, said Davis and Patrick claiming the possession; and plaintiff asks

that the defendants may be restrained from entering into or upon said mining property.

The application for a temporary injunction was heard by the judge of the Third District Court at Chambers, and, after the hearing, he granted the temporary injunction prayed for, and thereupon the defendant appealed to this court.

In considering the matter before us, we are to keep in view the fact, that during all the time of the dispute between Patrick and Hunter, the ownership and possession of the mining property in question remained in the respondent, the Flagstaff company; that Patrick acted as agent for the company, and Hunter does likewise. So plaintiff has not been out of possession, and the dispute is alone as to who is the authorized agent of the company, Patrick or Hunter. We think that this fact has, to some extent, been lost sight of in the consideration of the case by the parties.

But the defendants say that the possession of plaintiff was only through Patrick, under the contract with Davis, and that "plaintiff's possession was obtained by wrongful and unlawful means," thereby referring to the possession of the company under Hunter, and ask that the parties be restored to the positions occupied before such possession by Hunter took place.

If Patrick was entitled to retain the agency, the conduct of Hunter in taking possession as plaintiff's agent was unauthorized and wholly illegal. If Hunter was the agent, duly appointed, and Patrick was not, then when this fact was brought to the knowledge of those in the Territory having charge of the mining property, the company, by its agent, Hunter, was entitled to the possession and control of the mine, and no one had the right to resist such authority. The resisting of the authority of the company and a refusal to yield up the mining property was unlawful. The moment the knowledge of the change of agents came to the employees, that moment their power to act under an agent who had been removed ceased, and they had no rights in or to the property or to the possession. Such would not be like the case of a lease where the rights of landlord and tenant have to be considered, but it would be similar to a case where a man owns a piece of real estate and is in possession, and employs an agent, overseer or

superintendent under himself. In such a case, the principal's power to discharge such overseer or agent could not be questioned; and if such agent or overseer refused to leave the premises, but persisted in continuing to discharge the duties formerly devolving on him, he could be proceeded against as for trespass. If this could not be done, the employe could remain and discharge the duties of agent or overseer against the will of the principal and in violation of the rights of the principal, and the principal could not help himself. It would be the employe that would control the business and not the owner and possessor. This can not be the law.

But it must be further kept in view that the object of such temporary injunction is not to decide whether possession was obtained rightfully or wrongfully, but is merely to prevent any forcible and illegal attempts to gain or disturb the possession of property during litigation, and that its office is merely to keep matters in *statu quo* until the questions involved in the suit are decided: High on Inj., § 4.

It is a general doctrine that an agent holds his power only at the pleasure of the principal and when the principal discharges an agent all power and authority of that agent ceases. But there are exceptions to the rule, as when the power of attorney is coupled with an interest, or is for a consideration, or as security to the agent. Such power of attorney is said to be coupled with an interest when the interest is an estate in the thing about which the agency is created, and not in the proceeds, and when the agent could act in his own name and not in the name of the company in carrying out the powers conferred: *Hunt v. Rousmanier*, 8 Wheat. 203, *et seq.*

In the case at bar the power of attorney is made at the same time that a contract is made by the company with Davis. This contract requires the making of the power of attorney. Defendants claim that Patrick has the right to continue to act as agent, and to retain control of the property, by virtue of these two papers together. Patrick is not a party to the contract and has no interest therein. He can claim no rights except under his power of attorney. Davis has, however, an interest in both the contract and in the power of attorney, as the latter was made merely to carry out the former. Under the ruling in *Hunt v. Rousmanier*, above referred to, his in-

terest is not such as is contemplated by the rule as to irrevocability of power of attorney; that is, it is not an interest in the property, but only in the proceeds of the mining business: *Barr v. Schroeder*, 32 Cal. 609. By the language of some other authorities it is such an interest as may be embraced under the exceptions to the rule, as it was made to protect the rights of Davis: Wharton's Agency, § 95 and note; Story on Agency, § 477.

If the power of attorney alone existed, it would not be pretended that the removal of Patrick was not within the authority of the company; but the contract, so far as Davis is concerned, goes with it. And, assuming then that the power of attorney is a power coupled with an interest, if the contract be valid, we pass to the consideration of the question whether this contract with Davis is valid and binding upon the company. It is simply a question as to whether the directors transcended their powers in making it.

Chief Justice MARSHALL, in delivering the opinion of the court in *Dartmouth College v. Woodward*, held, that a corporation "being the mere creature of the law, it possesses only those powers which the charter of its creation confers upon it, either expressly or as incidental to its very existence": 4 Wheat. 636.

The same doctrine is again laid down by the Supreme Court of the United States, in almost the same language, in the case of *Perrine v. Chesapeake and Del. Canal Co.*, 9 How. 184. And this seems to be the settled doctrine: Angell & Ames on Corp., p. 86.

The power then to make the contract, if it existed, was either by the express words of the statute, or as incidental and necessary to the existence of the company. The contract is alleged to have gone beyond the powers of the directors in several respects. It is urged that the directors transcended their authority in borrowing money from said Davis in larger sums than specified in § 20 of the "Articles of Association," and in trying to bind the company by such a contract for the repayment thereof. It is answered, that although the amount is above that specified in § 20, yet that it was proper, as that section only had reference to borrowing on mortgage or debent-

ures and did not restrict the directors in borrowing without mortgage or debenture, and that the general authority given to the directors was equivalent to and covered the authority to borrow money. The general power is embraced in the closing lines of § 33 of the Articles of Association, which section, after detailing a number of powers specially granted, says: "And generally to do all matters and things which are necessary or may be deemed expedient for carrying on the business of the company." This power is quite broad.

It is probably true that "in general an express authority is not indispensable to confer upon a corporation the right to borrow money," and "it is sufficient if it be implied as the usual and proper means to accomplish the purposes of the charter": Angell & Ames on Corp., § 257.

The difficulty, however, is to ascertain whether the contract is embraced in the implied powers of the corporation under this general clause. There is no express authority given to borrow money except on mortgage or debentures, under certain circumstances.

If the power to borrow money by the directors, without the consent of the stockholders is given under this general clause, it can only be limited by what the directors may deem "expedient for carrying on the business of the company." The power is conveyed if it be within the "letter and spirit of the act of incorporation": Angell & Ames on Corp., pp. 86-7; *Beaty v. Knowler*, 4 Pet. 162. Was it, therefore, within the "intention of the charter?" *Utica Ins. Co. v. Scott*, 19 John. 1.

The power to borrow money by such a corporation is a very important power and one that the corporate articles would likely make express provision for, but yet they might not do so. To a certain extent such provision was made in § 20 of the Corporation Act, which provides that:

Sec. 20. "The company may, from time to time, with the sanction of a general meeting, borrow on mortgage or debentures, either transferable or to bearer, any sum or sums not exceeding £100,000, at such rate of interest as such meeting shall determine; and the board may borrow, without the sanction of a general meeting, on the like securities or on bills of exchange, any sum or sums not exceeding £10,000, at such rate as the board shall think fit."

In the "Memorandum of Association" we find that one of the objects of the incorporation is: "d. To borrow money and issue bonds transferable or to bearer, secured on all or any of the property of the company." If we consider together the general clause referred to in § 33, and also § 20, and this specification "d" in the "Memorandum of Association" (and there are no other provisions bearing upon the point), the power to borrow money was within the "spirit of the act" and the "intention of the charter," but the power to borrow could only be exercised in a particular way and to specific amounts, and the amounts borrowed from Davis were above the amounts authorized, and were not borrowed by the consent of the general meeting. The manifest intention of all of these provisions, taken together, was to authorize the directors to borrow to the extent of £100,000 with the consent of the general meeting, and to the extent of £10,000 without such consent, and that, if necessary, such loans could be by the directors, secured by mortgage on the company's property or by debentures. It was never intended by the charter to give the directors unlimited power to involve the company by borrowing money. The granting of the power to be done to a definite amount and in a certain way was a prohibition upon the directors to pursue any other course: *Zottman v. San Francisco*, 20 Cal. 96; Angell & Ames on Corp., § 111.

It is further urged that the contract with Davis was *ultra vires* in another respect, that it placed beyond the reach of the corporation, for an indefinite time, the appointment and removal of its agents. The contract required that Patrick should be the agent, and that he could be removed by Davis but not by the company, until Davis had been repaid advanced money, and certain ores had been delivered to him, and that Davis could remove Patrick at his pleasure, and appoint another agent for the company in Patrick's stead.

The articles of association say that the directors shall have power to appoint and remove agents, but the directors say that Davis may do these things and the directors shall not do so. The power to appoint agents and to remove unfaithful ones is a trust reposed alone in the directors, and they can not contract that power away. If that power is to be surrendered by the directors, it can only be surrendered to the corporation,

and not to a stranger. If the directors could transfer this power to a stranger, then we might have the anomalous case of the formation of a corporation for mining purposes and the power assumed by the directors and without the consent of the corporation to put the property of the corporation beyond the reach of the corporation and to make the carrying out of the very object of the corporation an impossibility. The power to appoint and remove agents and managers rests with the company, and this power can not be shifted or taken away by any contract made by the directors: *Neall v. Hill*, 16 Cal. 145; Grant on Corp. 243.

And further, Patrick, it is said and admitted, broke the contract with Davis by failing to make the monthly reports required, and this, too, without objection from Davis. If, for this violation of duty, the company could not remove Patrick, and thus repudiate the contract, then the contract was certainly one-sided. Davis reserved to himself the right to ignore the contract at pleasure, and to proceed against the company otherwise to secure payment of his debt. A corporation can not be bound by any such contract of its directors. The contract is not mutual but is *ultra vires*, as it is termed, beyond the authority of the directors, and is not binding upon the corporation: Fry on Specific Perf. 133; 2 Kent, 298-9.

And if it were true that such contract were binding upon the corporation after recognition, yet there is no evidence to show such recognition, except such as was made by the directors. But as the directors had no power to make such a contract, their recognition of it after it was executed made it no more binding. There is no evidence that the matter was brought before a general meeting of the company.

There are two minor points urged which we will notice. It is objected that the grounds of relief are alleged on information and belief instead of on direct and positive averment. Under § 113 of the Practice Act, the allegation upon information and belief is sufficient.

It is likewise charged that the complaint does not set out the facts constituting the fraud charged. This may or may not be necessary, but the court will not now pass upon the point, as, aside from this, the complaint sets out enough facts to constitute a cause of action under § 254 of our Practice Act: *Curtis v. Sutter*, 15 Cal. 259.

Upon the whole case, therefore, we consider that the complaint was a sufficient statement of a case, and that the evidence before the court below was sufficient to warrant the conclusions that the company had the right to remove Patrick and to appoint another agent in his stead, and that the evidence was sufficient to show a well-grounded fear that force would be used to wrest the possession from the duly appointed agent. Hence we conclude that the action of the court below in granting a temporary injunction was not improper, and its action is therefore approved. And, as was ordered by the judge below, this injunction is not to prevent defendants from instituting or prosecuting any proper legal proceedings to secure any just rights or claims which they or either of them may have against the plaintiff.

Judgment affirmed with costs.

SCHAEFFER, C. J., and EMERSON, J., concurred.

DOUGLASS, Respondent, v. IRELAND, Appellant.

(73 New York, 100. Court of Appeals, 1878.)

¹ **Personal liability of stockholder—Value of lands used to pay up stock, inquired into** In an action to charge the holder of stock of a corporation, issued for the purchase of property, individually, with the debts of the company under the laws of New York, it appeared that the entire capital stock of the corporation, \$300,000, was issued to H., one of the trustees, in consideration of the assignment to the company of two executory contracts on which nothing had been paid, one for furnace property at \$30,000 and one for woodland at \$10,000. H., without consideration, reconveyed to the company 600 shares, the par value being \$100 per share, to be sold to pay the contract price of the furnace property and 1,000 shares to be sold to raise working capital, of which defendant purchased 250 shares at 40 cts. on the dollar, he having participated in the whole transaction as a trustee of the company. *Held*, that to justify a recovery it is not sufficient to prove an error of judgment by the trustees in the valuation of the property, but that it must be shown that the purchase at the price agreed upon was in bad faith and to evade the statute; and the facts in this case were sufficient to justify such a finding of fraud. *Held, also*, that evidence of the value of the property purchased was competent.

¹ See cases under "PERSONAL LIABILITY."

Idem—Simultaneous action against trustees. An action brought against the trustees to charge them under the laws of New York with the same debt, because of failure to make the annual report, is no bar to an action against stockholders based on their personal liability.

Appeal from a judgment of the General Term of the Supreme Court in the Fourth Judicial Department, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought against defendant as a stockholder of "The Black River Iron and Mining Company of New York," a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848), under Section 10 of said Act, to recover certain debts of the corporation, on the ground that his stock was not paid up.

The complaint alleged, in substance, the incorporation of said company with a capital stock of \$300,000, with five trustees, of whom one was defendant and another John Horton. That at the time of the incorporation Horton had a contract for the purchase of a furnace and mining premises, and one for the purchase of standing timber in the vicinity of the furnace, upon which contracts nothing had been paid, and their fair value did not exceed \$20,000; which contracts Horton assigned to said company, receiving therefor the whole of the capital stock; that Horton thereafter divided \$200,000 of said stock between himself and the other trustees, and defendant well knowing the facts received over \$5,000 thereof; that said stock has never been paid in any other way, and that no certificate as required by section 11 of said Act has been made and recorded.

Upon the trial, evidence as to value of the property was received under objection and exception. The question as to value was by consent submitted to the jury, the other questions were decided by the court. The jury found the value of the property to be \$64,000. The court found the incorporation of the company with a capital of \$300,000, in 3,000 shares, the issuing and transfer of its capital stock in payment for the assignment of the two contracts, substantially as alleged in the complaint; also, that Horton, in pursuance of the agreement with the company, on or about the same date, transferred back to the company 600 shares of the capital stock to be sold

to pay the contract price for the furnace property, which was \$30,000, and also transferred back 1,000 shares of the capital stock in pursuance of the same agreement "for the purpose of enabling said company to raise a working capital by the sale of the same"; "that defendant, knowing of and participating in the transactions, purchased of the company 250 shares for the sum of \$10,000; that the value of the property was so disproportioned to the nominal value of the stock as "to take the case out of a sound discretion exercised by the trustees"; and as conclusions of law he found that the transaction was a fraud upon the law, and can not be upheld as a mistake or innocent misunderstanding of the value of the said property"; that the capital had not been paid in as required by the statute, and that defendant was liable.

Further facts appear in the opinion.

FRANCIS KERNAN and NICHOLAS E. KERNAN, for appellant.

C. D. ADAMS, for respondent.

ALLEN, J.

The question upon which this court divided in *Boynton v. Hatch*, 47 N. Y. 225, has been definitely settled by the later decisions of this court as well as the Commission of Appeals. The views I there expressed, and which were agreed to by two of my brethren, have been approved; and it is now settled that to charge a holder of stock issued upon and for the purchase of property individually for the debts of the company, it is not enough to prove that the property has been purchased and paid for at an overvaluation through a mere mistake or error of judgment on the part of the trustees, but that it must be shown that the purchase at the price agreed upon was in bad faith and to evade the statute. The transaction may be impeached for fraud, but not for error of judgment or mistaken views of the value of the property, inasmuch as good faith and the exercise of an honest judgment is all that is required: *Schenck v. Andrews*, 57 N. Y. 133; *Boynton v. Andrews*, 63 Id. 93.

The entire capital stock of the "Black River Iron and Mining Company" was issued to Horton, one of the trustees, in

consideration of the assignment to the company of two executory contracts; the one for the purchase of a furnace property and premises, and the other of certain woodlands. No part of the capital stock was paid in money, or otherwise than by the assignment of the contracts referred to, and no certificate has been filed as required by section 11, of chapter 40, of the Laws of 1848, that the capital stock has been paid in.

As was said in *Boynton v. Hatch, supra*, sections 10 and 14 of the General Law of 1848, *supra*, and section 2, of chapter 33, of the laws of 1853, *supra*, are *in pari materia*, and must be read together as parts of the same general law; and the law is that the entire capital stock of moneyed and manufacturing corporations organized under the general laws for that purpose must be paid in money, and a certificate thereof filed by the trustees, as required by the law of 1848; and stockholders remain individually liable for the debts of the company until these conditions of the statute are complied with, subject only to the exception engrafted upon the prior general law by the Act of 1853, to the effect that the trustees of such companies may in good faith purchase property necessary to their business, and issue stock to the amount of the value thereof in payment therefor; and the holders of stock thus issued are exempt from liability for the debts of the corporation under section 10 of the prior law. The stock issued in payment for property may be a part of the whole of the capital stock contemplated by the articles of association, or of new stock created for that purpose: *Schenck v. Andrews*, 46 N. Y. 589.

The statute, however, only exempts stockholders from liability under section 10 of the original statute, in respect of stock issued in good faith, pursuant to the privilege conferred by the supplementary act of 1853; that is, to the amount of the value of property in payment for which it is issued. A deliberate and advised overvaluation of property thus purchased and paid for is a fraud upon the law, and a violation of the condition upon which the exemption of stockholders from liability under the provisions of the original statute is made to depend. It is in direct violation of the policy as well as of the terms of the law which demands payment, either in money or property at its value, of all the capital stock of the company, as a condition of immunity to the stockholders from lia-

bility for debts of the corporation. The payment of an amount for property in excess of its value deprives creditors and the public of the security contemplated by the statute, and thus a fraud is perpetrated as well upon the law as upon creditors. The fraud is consummated by the issue of stock as full paid stock, under the Act of 1853, which has not been fully paid for in value by the property for which it is issued; and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued in pursuance of the Act of 1853, is to prove two facts: 1st, That the stock issued exceeded in amount the value of the property in exchange for which it was issued; and 2d, That the trustees deliberately, and with knowledge of the real value of the property, overvalued it and paid in stock for it an amount which they knew was in excess of its actual value. The value must be determined in any action in which the question arises upon such evidence as may be given, having respect to the circumstances and the nature of the property; and the *scienter* and guilty action of the trustees may be proved either directly or inferred from circumstances.

The complaint does not specifically *in totidem verbis* charge guilty knowledge of the value of the property and a fraudulent intent upon the trustees in the purchase from Horton; but it does aver facts which, if proved, would authorize the inference of every fact necessary to sustain the action. The purchase of property the value of which did not exceed \$20,000, from Horton, one of the trustees, and the issue of the entire capital stock of the company to the amount of \$300,000 therefor, is alleged, with an averment that \$200,000 of the stock thus issued was divided between Horton and the other trustees, of whom the defendant was one, and that the defendant, well knowing the facts, received upon such division more than \$5,000 of the stock at its par value, and still holds and owns the same. The seller of the property may well be presumed to know its value, and knowledge by the defendant of all the facts stated, including the alleged value of the property, is averred. It is a very significant fact as alleged giving char-

acter to the transaction that the seller of the property was willing to and did divide with his co-trustees, the bargainers, two thirds of the nominal consideration he received for it. This is entirely inconsistent with the idea that the sale was a *bona fide* sale for the supposed actual value of the property, and without explanation would be conclusive evidence that the purchase by the trustees was not, in the exercise of an honest judgment and the discretion vested in them, at the real or supposed value of the thing purchased; but that under color of a compliance with the provisions of the Act of 1853, the purchase of the property and the issue of the stock was a palpable evasion of, and fraud upon the law. The complaint does, in its substantive facts, make a case entitling the plaintiff to recover, by showing that the stock held and owned by the defendant was not issued for property purchased in good faith for the business of the company and for the amount of its value, but was issued in fraud of the law and of those who should afterward deal with and become creditors of the corporation. The evidence of the value of the property was therefore competent, and the objection to its admission was properly overruled.

The facts found by the judge were warranted by the evidence, and sustain the judgment founded thereon. The jury, to whom the question of value was submitted, found the value of the property to be \$64,000, and this was a liberal estimate upon all the evidence. The other questions of fact and the whole case upon the law were submitted to the judge as upon a trial by the court; and it is found as a fact that the value of the property was so disproportionate to the nominal value of the stock issued as to take the case out of a sound discretion exercised by the trustees, and as a conclusion of law that the transaction was a fraud upon the law, and not to be upheld as a mistake or innocent misunderstanding of the value of the property, and that the capital stock of the company had not been paid in as contemplated by law.

The property was held by Horton under executory contracts of purchase upon which nothing had been paid, the purchase money being wholly unpaid. The contract price for the furnace property was \$30,000, and the contract was made but about a year before the sale to the company. The contract

for the woodland had been entered into but about five months before the sale to the company, and was for \$10,000, to be paid for as the wood should be cut. One third of the stock issued was immediately re-transferred to the company, to be sold by it to raise a "working capital" and enable the company to prosecute its business, and this stock was sold at prices ranging from forty to sixty cents on the dollar of its par value, the defendant buying his at the lowest price named. In this sale of stock by the corporation to the defendant we have the estimate of both buyer and seller, that is, of all the trustees of the company of the value of the property acquired and owned by the company, and represented by the nominal capital of \$300,000. By that sale and purchase they fix the value of the property at only \$120,000, which is nearly double the value proved upon the trial and found by the jury. The defendant can not complain if the property is valued at his own price.

The surrender and re-transfer of \$100,000 of the stock to the company, without consideration, is some evidence that the \$300,000 was not regarded as the value of the property but that it was so treated with a view to absorb the entire capital stock, and the sale of the stock received by the company at the prices stated was very persuasive evidence of the opinion entertained by the trustees of the value of the property as represented by the stock. The learned judge, before whom the case was tried, was clearly right in his views of the transaction.

The action against the defendant and others, the trustees of the company, for not making the report required by section 12 of the general act, *supra*, although brought to recover the same debts, is not a bar to this action. The two actions are not for the same cause; they can not be sustained upon the same evidence; they are to enforce different liabilities, and the judgment in each case is different.

The judgment must be affirmed.

All concur, except CHURCH, Ch. J., not voting.

Judgment affirmed.

UTLEY ET AL. V. THE CLARK-GARDNER LODE MINING Co.

(4 Colorado, 369. Supreme Court, 1878.)

Constitutional law—Conditions imposed upon foreign corporations.

Section 213, Gen. Laws, requiring foreign corporations, before they shall be permitted to do business in Colorado, to file a certificate with the Secretary of State, etc., is designed to enforce the provision of the State Constitution requiring foreign corporations to have a known place of business, and an authorized agent in the State, upon whom process may be served, before doing business therein, and is not in conflict with the Constitution of the United States.

¹ **Foreign corporation may sue without filing certificate.** Upon suit brought by a foreign corporation a special plea was filed setting up that plaintiff had not complied with the foregoing provision, and a demurrer to the plea was sustained. Defendants stood by their plea and the Supreme Court affirming the judgment, *held*, that a corporation is a creature of local laws and has no absolute right of recognition outside of the limits of the sovereignty which created it; beyond such limits it is dependent upon the comity of the several States, and its rights must be enforced under such limitations as each State may think wise to prescribe; but that the bringing of suit is the seeking to enforce rights springing from business transactions, and is not the doing of business so as to require the filing of the above certificate.

Pleading—Admissions by failure to plead over. In an action of trespass the declaration alleged ownership of the close; a demurrer to the defendant's plea in abatement was sustained and the defendant failed to plead further: *Held*, that by this course the defendant admitted all the facts alleged in the declaration, and would not be permitted to prove in mitigation of damages an entry under color of title; or to interpose any substantive defense.

Appeal from District Court of Gilpin County.

The case is stated in the opinion.

BELFORD & REED, for plaintiffs in error.

L. C. ROCKWELL and H. B. MORSE, for defendants in error.

ELBERT, J.

August 25, 1877, the Clark-Gardner Mining Company of New York filed a declaration in trespass containing two

¹ *Cowell v. Colorado Springs Co.*, 100 U. S. 55.

counts. The first count charges the breaking and entering upon claims Nos. 7, 8 and 9 of the Gardner lode and breaking ore, etc. The second count is *de bonis asportatis*.

The defendants filed the following special plea: "And the said Alvin H. Utley and John Burkhardt, by Belford and Reed, their attorneys, come and defend the wrong and injury, when, etc., and pray judgment of said writ, because they say that the said Clark-Gardner Lode Mining Company is now and was at the commencement of this suit, a foreign corporation, and that said Clark-Gardner Lode Mining Company at the time of the commencement of this suit had not filed in the office of the Secretary of State of the State of Colorado, and in the office of the clerk and recorder of the county in which its business is carried on, a certificate signed by the president and secretary of such corporation, duly acknowledged and designating the principal place where the business of said corporation shall be carried on in this State, and designating an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served, and did not at the time this suit was commenced have any known place of business and an authorized agent or agents in the same upon whom process might be served; and this the said defendants are ready to verify; wherefore they pray judgment of the said writ in this suit, and that the same may be quashed," etc.

To this plea, the plaintiff below demurred, the demurrer was sustained, and the defendants stood by their plea.

Section 213, General Laws, p. 151, upon which the plea is based, is as follows:

"Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served." * * *

This provision is intended to enforce section 10, article 15,

of the Constitution, which declares: "No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served."

State legislation of this character is held not to be in conflict with that clause of the Constitution of the United States which declares "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States"; nor with the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States."

A corporation is the creature of local laws; it has no existence or absolute right of recognition outside the limits of the sovereignty which created it.

For the recognition of its existence and the enforcement of its contracts without such limits, it is dependent upon the comity of the several States, and this comity may be extended upon such terms and under such limitations as each State may think wise to prescribe: *Bank of Augusta v. Earle*, 13 Peters, 538; *Paul v. Virginia*, 8 Wall. 168.

The Constitution and statutory provisions cited, embody the policy of our State toward foreign corporations. The statute prescribes the terms and conditions upon which they may transact business within the State upon an equal footing with domestic corporations. They shall designate, in a manner prescribed, their principal place of business and an agent or agents residing thereat, upon whom process may be served. In substance, they shall put themselves in a position to be amenable to the process of the State courts. Similar statutes exist in most of the States of the Union, the object being to protect the citizens of the State, dealing with foreign corporations, from the hardship of pursuing their rights in distant jurisdictions.

The terms prescribed can not be justly characterized as harsh or onerous; on the other hand, they are simple and equitable, and upon compliance the doors are thrown wide open to foreign capital, represented by foreign corporations, to compete in the various industries and businesses of the State upon an equal footing with domestic corporations.

The statute is prohibitory in its terms. They *shall* file the

designated certificate "before they are authorized or permitted to do any business in this State."

The Oregon statute, substantially like this, is held to be prohibitory: *In re Comstock*, 3 Saw. C. C. 223; *Sample v. Bank of British Columbia*, Chicago Legal News, April 20, 1878.

In the first case, DEADY, J., says: "The purpose of the act is apparent. As has been said, it is to secure the people of the State the right to sue the foreign corporations in the courts of the State; but unless the attorney is appointed before the business is transacted, it will not be attained. In *Rex v. Locksdale*, 1 Burrows, 447, Lord MANSFIELD laid down the rule 'that whether a statute is mandatory or not depends upon whether the thing directed to be done is the essence of the thing required.' Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is required, and without this statute would be utterly inoperative. This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this State without first complying with its terms."

That another section prescribes a penalty for failure or neglect to comply with the requirements of the statute does not affect this conclusion: *Cin. Mut., etc., Co. v. Rosenthal*, 55 Ill. 85.

Admitting the statute to be prohibitory, it is insisted that the case at bar presents no occasion for its application; that the plea is in abatement, and goes only to the competency of the plaintiff to sue; and that the institution of its suit by the plaintiff was not an act of business within the prohibition.

What meaning and what limits are to be assigned to the statutory phrase, "to do business," is a matter of elaborate argument by counsel.

A corporation is defined to be "an artificial being, invisible, intangible and existing only in contemplation of law." It can do no acts, either within or without the State which creates it, except such as are authorized by its charter. To such charter we must look to determine the powers it may lawfully exercise.

Ordinarily they have the power to sue; the power to con-

tract, limited to the objects of the company; and the power to acquire as well as to hold and enjoy property, real and personal, limited to the necessities of the company. Taking language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers.

By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations and acquires rights. By its power to sue it does not seek to do business, as that term is generally understood, but to enforce rights springing from business transaction.

By the comity of the States composing the Union a corporation created by the laws of one State may exercise all the enumerated powers in any other State, in the absence of any prohibitory statute or conflicting policy: Story's Con. Law, § 38.

Our prohibitory statute must be interpreted with reference to this general doctrine and language affecting the capacity of a company to contract or acquire real or personal property must not be enlarged to prohibit the exercise of another and independent power, that might be exercised by virtue of this general rule of comity which existed prior to the adoption of the statute.

The question is, how far is this general rule modified or abridged by the statute. The prohibition extends to doing business before compliance with the terms of the statute. We do not think this an abridgment of the right of a foreign corporation to sue. It extends only to the exercise of the powers by which it may be said to ordinarily transact or carry on its business. To what *extent* the exercise of these powers is affected we do not decide.

The failure, therefore, of the plaintiff company to comply with the terms of the statute, however it may affect its right to hold and enjoy the property, the subject of the trespass, did not affect its capacity to sue. The plea was in abatement and went only to the power of the corporation to maintain its action. The plea to have availed, if at all, should have been in bar of the action. The demurrer was properly sustained.

Upon the assessment of damages, two questions are made

1st. That the court erred in refusing to allow the defendants to prove, in mitigation of damages, an entry under color of title.

By not pleading further the defendants admitted all the facts alleged in the declaration, which were well pleaded, and they could not be controverted on the inquest. Nor was it competent for the defendants to interpose any substantive defense: *Town of South Ottawa v. Foster*, 20 Ill. 298.

The declaration, in its first count, alleges ownership of the close and trespass *vi et armis*.

The defendants, by their admission, stood in the position of naked trespassers, without color of right or title. Their offer to show that their entry was under color of title, to reduce the damages, was in conflict with their admissions, and was properly rejected.

2d. It is insisted that, as there was no re-entry by the plaintiff after ouster, it could only recover nominal damages.

This objection goes only to a recovery on the first count, and we do not examine it, as a recovery was admissible under the second count.

As to the chattels therein mentioned, the title and right of possession of the plaintiff were admitted, and the defendants could not be heard to question either on the inquest.

The judgment of the court below is

Affirmed.

SANTA CLARA MINING ASSOCIATION V. MEREDITH.

(49 Maryland, 389. Court of Appeals, 1878.)

¹ **Recovery by director for extra services.** A president or director of a corporation rendering services to the corporation outside the scope of his official duty and not required thereby, may recover compensation therefor upon a promise implied from facts and circumstances.

¹ *Cheaney v. Lafayette Co.*, 68 Ill. 570.

Action for services by a director of a corporation in procuring a patent, and in negotiating loans in various cities. The opinion states the case sufficiently. The plaintiff had judgment below.

FIELDER C. SLINGLUFF, for appellant.

GEORGE G. HOOPER and WM. PINKNEY WHITE, for appellee.

GRASON, J.

At the trial of this case in the Baltimore City Court the plaintiff offered three prayers, the two first of which were granted and the third was refused; the defendant offered seven, all of which were rejected except the sixth, which was granted, and the judgment being in favor of the plaintiff, the defendant appealed.

The question presented by the prayers for our determination is whether an officer of a corporation can recover for services rendered the corporation without an express contract of employment.

We have carefully examined the authorities referred to by the counsel of the respective parties, and, without in this opinion entering upon a review of them in detail, we deem it sufficient merely to state the principles of law which they establish. To entitle a president or director of a corporation to recover for services rendered his corporation, he must prove an express contract of employment if the services for which he claims compensation are within the line and scope of his duties as president or director. To this effect are nearly all the cases cited in the briefs, and this general principle is admitted by the counsel of the appellee to be correct. But if a president or director of a corporation renders services to his corporation which are not within the scope of, and are not required of him by his duties as president or director, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise: See Angell & Ames on Corp. § 317; *Chandley v. Monmouth Bank*, 1 Green, 260; *Henry v. Rutland & Burlington R. R. Co.*, 27 Vt. 455; *Hall v. Vermont & Mass. R. R. Co.*, 28 Id. 408; *New York*

& *New Haven R. R. Co. v. Ketchum*, 27 Conn. 181; *Evans v. City of Trenton*, 4 Zabr. 769.

Agency for a corporation is not required to be shown by a resolution of the board of directors or other written evidence, but it may be inferred from facts and circumstances: *Union Bank v. Ridgely*, 1 H. & G. 326; 1 Md. Ch. Dec. 398; *Elys-ville Man. Co. v. Okisko Co.*, 5 Md. 159; *N. C. Railway Co. v. Bastian*, 15 Id. 501; *Bank of the United States v. Dandridge*, 12 Wheat. 69, 70, 83.

All the prayers of the appellant asked instructions that the plaintiff was not entitled to recover unless the jury should find an express contract of employment of the plaintiff by the defendant. We have shown that his employment as agent of the defendant may be inferred from facts and circumstances, and the appellant's prayers were therefore properly rejected. There were facts and circumstances in evidence, from which the jury were at liberty to infer that the appellee was employed by the appellant in respect of obtaining a patent for the lands in California in obtaining the loan in London, and in procuring the surrender and cancellation of the first mortgage bonds of the company, the accomplishment of the latter being indispensable to the obtention of the loan. There is evidence in the record tending to prove that these services were either authorized by the corporation previously to their rendition or were ratified by it after they were performed, and that they were such services as were not required of the appellee in the discharge of his duties as a director. All these matters were left to the finding of the jury by the instructions granted in the appellee's first and second prayers, and if found in his favor he was entitled to recover a reasonable compensation for his loss of time and for services rendered. These two prayers were therefore properly granted.

The verdict was for an amount *in solido*, and whether in view of the refusal of the court to grant the appellee's third prayer and in the granting the appellant's sixth, it was for a larger sum than it ought to have been, this court can not inquire. Finding no error in the rulings of the court below the judgment appealed from will be affirmed.

Judgment affirmed.

KENT V. THE QUICKSILVER MINING CO., DREW ET AL.

KENT V. THE QUICKSILVER MINING CO., KING, JR., ET AL.

HOYT V. THE QUICKSILVER MINING CO., KENT ET AL.

(78 New York, 159. Court of Appeals, 1879.)

Preferred stock, when illegal. By a special charter the Q. M. Co. was granted authority to issue certificates of stock representing the value of its property, in such form and subject to such regulations as it might by its by-laws prescribe. Pursuant to this authority, the company adopted the following by-law: "Certificates of stock amounting to \$10,000,000 shall represent the value of the property of the corporation, and the capital stock shall be divided into 100,000 shares of \$100 each." After the stock had been issued, and at an annual meeting of the stockholders, by vote of the majority of the stock, the above by-law was amended by adding the words: "Certificates of stock upon which five dollars shall be paid, shall be distinguished as preferred stock," and by other by-laws and resolutions it was provided that preferred stock should be entitled to seven per cent. out of the net earnings each year, and any surplus of earnings should be divided *pro rata* among the holders of preferred and common stock, and that the preferred stock should be issued to all holders of common stock who surrendered the same, share for share, upon the payment of five dollars per share. 42,913 shares were so surrendered and preferred stock issued in lieu thereof, and for four years both preferred and common stock were quoted in the public prints and sold at the stock exchange, the former bringing the highest price. At the expiration of this period actions were brought to have a judicial declaration that the creation of the preferred stock was unauthorized. *Held*, that the by-law quoted, when adopted, was as much the law of the corporation as if it had been a provision of the charter, and it entered into the compact between the corporation and every taker of a share, so that a division of the stock into the two classes could not be made without the consent or acquiescence of the owners, but that in this case, the owners were chargeable with notice of the issuance of the preferred stock, and having acquiesced therein, they were bound by it, at least as against purchasers of stock in the open market; and as it was impracticable to cancel a portion of such shares without canceling all, none of it would be so treated.

Stockholders, how affected by acts ultra vires. Acts of a corporation which are not *malum in se* but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them dealing in good faith with the corporation will be protected in a reliance on such acts.

Estoppel. To work an equitable estoppel upon the stockholders, it was

not necessary that they should expressly assent to the issuance of the preferred stock; it was sufficient that they neglected actively to condemn the unauthorized act and to seek judicial relief until third parties would be injured by the granting of it.

Unconscionable arrangement enforced. An unconscionable arrangement will not be disturbed when there has been a ratification of it with knowledge of all its bearings, after time has been had for consideration.

These are appeals from judgments of the General Term of the Supreme Court, First Judicial Department, affirming judgments at Special Term.

The judgment in the first entitled action restrained the defendant, The Quicksilver Mining Company, from converting or agreeing to convert the shares of its stock known as common stock into preferred stock, and from issuing any further preferred stock, and the individual defendants from converting any of the common stock into preferred stock. (Reported below, 12 Hun, 53.)

The second action was brought for an accounting by said company, and for a distribution of the net earnings as follows: To pay first to the preferred stockholders seven per cent. per annum upon the amount of their stock, the residue to be divided *pro rata* among the holders of the common and preferred stock.

The third action was brought to restrain said company from paying, and the individual defendants, holders of preferred stock, from receiving any sums as interest or as dividends in excess of dividends paid on the common stock; to restrain said company from issuing any further preferred stock; to have the preferred stock already issued declared illegal, and for an accounting and distribution of the net earnings equally among the stockholders. The judgment dismissed plaintiff's complaint, adjudged the preferred stock to be legal and valid, and its holders entitled to the preference it purported to give, and directed the said company to account and to distribute its net earnings accordingly. (The last two cases reported in 17 Hun, 169.)

The material facts found were substantially as follows: The Quicksilver Mining Company is a corporation created by a special act of the legislature of the State of New York, passed April 10, 1866 (Chap. 470, Laws 1866, p. 1021), "for the purpose of holding and improving lands in California, or else-

KENT ET AL. V. QUICKSILVER MINING CO. ET AL. 49

where, and obtaining therefrom minerals and other valuable substances, and disposing of the products of such lands, mines and works."

Section two of the charter is as follows:

"Section 2. The said company shall have power to make such by-laws as they may deem proper, to enable them to carry out the objects of the corporation, and the same to alter, amend, add to, or repeal at their pleasure, provided that such by-laws shall not be contrary to the Constitution of this State, or the provisions of this act, and to adopt a common seal, and the same to alter at pleasure, and to issue certificates of stock, representing the value of their property, in such form, and subject to such regulations as they may, from time to time, by their by-laws prescribe, and to regulate and prescribe in what manner and form their contracts and obligations shall be executed."

The charter contains no further provision in respect to the capital stock. The company adopted the following by-laws, among others:

"Four. Certificates of stock, amounting to \$10,000,000, shall represent the value of the property of the corporation, and the capital stock shall be divided into 100,000 shares of \$100 each.

"Five. The said certificate shall be in such form as shall be prescribed by the board of directors.

"Six. All certificates shall be registered on the books of the company when issued. No certificate shall be transferable, except on the books of the company, or of an agent appointed by the board of directors for that purpose. Every share of stock shall entitle the holder thereof to one vote at all meetings of the corporation, and may be voted on by proxy in the usual form.

"Seven. The contracts and obligations of the company shall be made and executed in such manner and form as the directors may determine.

"Eleven. No dividend shall be made except from actual surplus profits, and these profits (except a reasonable reserve fund) shall be divided as often as once in six months. All dividends shall be payable at the office of the company in New York.

"Fourteen. The directors may, from time to time, on the

credit and responsibility of the company, borrow such sums of money as they may deem consistent with the interests of the company, and as security for the repayment of such loans they shall have the authority to issue notes of the company, and to pledge or mortgage any shares of stock or other estate, personal or mixed, belonging to the company.

“Sixteen. These by-laws may be altered, amended or repealed, at any regular or special meeting of stockholders, by a vote of a majority in interest of all the stockholders.”

The capital stock authorized by the fourth by-law was issued in one certificate to William Bond, president, and George J. Forest, treasurer of the Quicksilver Mining Company of Pennsylvania in payment for mining property purchased of the Pennsylvania company, and for the purpose of being distributed among the holders of the stock of that company, share for share.

At the annual meeting of the stockholders of the company, held pursuant to notice, as required by the by-laws, on the fourth Wednesday of February, 1870, the following amended by-laws and resolutions were adopted by a unanimous vote of 75,658 shares.

“By-law IV. Certificates of stock amounting to \$10,000,000 shall represent the value of the property of the corporation, and the capital stock shall be divided into 100,000 shares of \$100 each. Certificates of stock upon which five dollars (\$5) per share shall be paid, shall be distinguished as preferred stock.

“By-law XI. The preferred stock shall be entitled to interest at the rate of seven per cent. per annum, from the 1st of May, 1870, to be paid annually out of the net earnings of the company for each year. Should there remain a surplus of earnings after the payment of the said interest upon the preferred stock, then this surplus shall be divided *pro rata* among the holders of preferred and common stock, in proportion to their several interests.

“*Resolved*, That a preferred stock of the company be issued in shares of \$100 each, and that the treasurer be directed to open books at the office of the company in the city of New York, and to receive subscriptions to said preferred stock. Such subscriptions shall be received only from the holders of

the common stock of the company on their surrendering to the company common stock, and paying to the treasurer five dollars on each share of stock surrendered.

“ The common stock so surrendered shall be canceled before the issue of the preferred stock, share for share.

“ *Resolved*, That the books for subscription to the preferred stock shall be closed by the board of directors whenever the interests of the company, in their opinion, will be promoted by so doing.”

Books for subscription were accordingly opened; circulars containing the amended by-laws and resolutions were distributed to the stockholders, and notices were published in the New York daily papers. Owners of common stock to the amount of 42,913 shares subscribed for a corresponding number of shares of preferred stock, surrendered their said shares of common stock and paid to the company the sum of five dollars on each share so surrendered; and the company thereupon issued and delivered to them certificates of shares of preferred stock, in which it was stated that such stock was entitled to the preference, specified in said amended by-laws. Since that time the two forms of certificates have been issued and continue to be issued by the company upon the surrender of like certificates for transfer; and the entire capital stock of the company, both common and preferred, has been transferred and the certificates thereupon surrendered and new certificates issued corresponding to those surrendered. Since May, 1870, the stock of the said company has been regularly called at the Stock Exchange in the city of New York, and there openly bought and sold in the usual manner under two designations, viz.: “ Quicksilver common,” and “ Quicksilver preferred,” and upon such sales the price of “ Quicksilver preferred” has always been in advance of “ Quicksilver common”; and reports of such calls, purchases and sales of said stocks have been regularly made by the Stock Exchange and published in the daily papers in the city of New York. The sum realized from subscriptions to the preferred stock was appropriated by the company to the payment of its current expenses, the interest on its mortgage debt and of judgments for which the company was liable. At the annual meeting of the stockholders in February, 1871, the report of the president was

submitted, stating that the by-laws authorizing the preferred stock were adopted at the last annual meeting by a unanimous vote of 75,658 shares, giving a complete copy of such by-laws, with a detailed statement of the amount received for subscription to the preferred stock and the disbursement of the same, and also showing the number of shares of common and of preferred stock. This report was by resolution approved, and the same, with accompanying statement, was directed to be published in pamphlet form for the information of the stockholders. Annual reports were presented and accepted at the annual meeting of the stockholders held in the month of February in each of the years 1872, 1873, 1874, 1875, 1876 and 1877. Such reports were printed pursuant to resolutions adopted at the annual meetings, and were distributed to stockholders and other parties interested. At the annual meeting of the stockholders, held on the 24th of February, 1874, the following preamble and resolutions were adopted by a vote of 68,274 shares in the affirmative to 2,500 in the negative.

“Whereas, at a meeting of the stockholders, held February 24, 1870, a resolution was adopted giving the privilege of conversion into preferred stock to the holders of the common stock of the company upon the payment of five dollars per share for each share of common stock so converted, and that the option of such conversion was duly closed by the directors on the eighteenth of April following, at which time 42,913 shares of preferred stock had been issued as above provided.

“And, whereas, from the report of the president, submitted to this meeting, it seems desirable that previous to the payment of dividends the same privilege of conversion should be extended to the holders of the 57,087 shares of the common stock now outstanding, it is hereby

“*Resolved*, That the company will issue its preferred stock to the holders of the common stock of the company, share for share, upon the surrender of such common stock, and the payment, at the time of issue, of five dollars and interest from February 24, 1870, upon each share of stock so surrendered.

“*Resolved*, That the common stock so exchanged shall be canceled previous to the issue of preferred stock, share for share.

“*Resolved*, That the directors be hereby authorized at their

option, to close the books of the preferred stock for the purpose of this exchange whenever, in their judgment, the interest of the company will be promoted thereby, giving——days' notice previous thereto."

Previous to the sixteenth day of November, when the action of *Hoyt v. The Quicksilver Mining Company* was commenced, no suit or legal proceeding of any kind was brought by any common stockholder to restrain the issue of said preferred stock, or to have the same declared invalid, or to prevent the carrying out of the contract with the preferred stockholders; nor previous to the said meeting of stockholders in November, 1874, was any written protest or statement made in reference to the preferred stock, nor previous to that meeting was any serious or public objection to said preferred stock ever made, or any serious or public question as to its validity raised by any stockholder.

JOSHUA M. VAN COTT, for the Quicksilver Mining Company, appellant.

WILLIAM ALLEN BUTLER, for Hoyt et al., appellants.

JOHN K. PORTER, for Kent, respondent.

JOHN R. DOSPASSOS, for Quigley et al., preferred stockholders, respondents.

FOLGER, J.

These are suits in equity to perpetually restrain the Quicksilver Mining Company from taking certain action, on the one hand proposed by it, with the expressed assent of some only of the stockholders in it; and on the other hand, demanded of it by certain other of the stockholders in it, which demand it, and still other stockholders resist.

Whatever the frame of the pleadings in the several actions, and whatever the formal prayer for judgment, the purpose of the litigation in each is to reach a final and binding judgment, whether certain "preferred stock," heretofore created by that company, is so far valid as to be recognized in the future business of the company as giving to the holders thereof the peculiar right expressed in the certificate thereof.

What is meant by "preferred stock" is well enough known in law and business, without definition or circumlocution here.

All the powers which that company had were given to it by its charter (Laws of 1866, chap. 470, p. 1021); and by the Revised Statutes (vol. 1, pp. 599, 600, secs. 1, 2, 3). Thereby it had the usual general powers of a corporation: See Angell & Ames on Corporations, sec. 110. It had also the peculiar power of holding, improving and working mining lands in California and elsewhere, and of disposing of the product thereof. It has also the power to issue certificates of stock, representing the value of its property, in such form and subject to such regulations as it might from time to time by its by-laws prescribe; and to regulate and prescribe in what manner and form its contracts and obligations should be executed. It is claimed that it had also incidental and implied powers. So it had, so far as permitted by the Revised Statutes, which declare that in addition to the powers therein enumerated and to those expressly given in its charter, it should not possess nor exercise any, except such as should be necessary to the exercise of the powers so enumerated and given: 1 R. S. 600, sec. 3.

Plainly a mining corporation, for the exercise of its power of mining in its lands, must have money. Hence, if it has it not, and can not otherwise readily get it, it must, as necessary to the use of its corporate rights, have the power to borrow it, and in any way and upon any obligation or security to be given by it, that is not unlawful: *Curtis v. Leavitt*, 15 N. Y. 9. It may borrow it from the stockholders in it, as well as from other parties; and it may determine and agree to borrow from them only. This corporation was in need of money to carry on its authorized business. It did get money for that purpose and because of that need, from some of the stockholders in it; and in that instance from some of them alone. If the mode by which that money was got was a borrowing, within the sense which the law and common acceptance give to that term, then the transaction so far would have been lawful; and it would have remained to inquire whether the obligation given was a lawful instrument. But it was not a borrowing. The idea of a borrowing is not filled

out unless there is in the agreement thereof a promise or understanding that what is borrowed will be repaid or returned; the thing itself or something like it of equal value, with or without compensation for the use of it in the meantime. To borrow is the reciprocal action with to lend; and to lend or to loan, say the dictionaries, is the parting with a thing of value to another for a time fixed, or indefinite, yet to have some time an ending, to be used or enjoyed by that other—the thing itself, or the equivalent of it, to be given back at the time fixed, or when lawfully asked for, with or without compensation for the use, as may be agreed upon. In this transaction with some stockholders, that corporation had not the right, nor was it under the liability to never pay back the five dollars per share furnished by them to it; that was not named in the terms of the obligation given, nor was it contemplated in the negotiation and bargain. The stockholder had not, by the scope of his bargain, nor by the terms of the written evidence of it, any right ever to ask for repayment of the money furnished by him. In short, there was not formed thereby the relations of debtor and creditor. The stockholder parted forever with the money furnished, inasmuch as the charter of the company is perpetual, and the company made a perpetual charge upon its net earnings. Though there was a compensation fixed for the use of the money, and though it was to take the form of a yearly payment, and at a rate the same as the then lawful rate of interest, yet we can not conceive that the transaction was a loan and borrowing of money, with a compensation for the use of it. If it had been, though the compensation was great for the sum furnished, yet it was not a violation of the usury laws of which the corporation could avail itself (Laws of 1850, chap. 172); and the courts might not overhaul it; save perhaps as an unconscionable and extortionate agreement (1 Story Eq. Juris., secs. 246–331), as to which we will speak again before the close. The transaction is not to be looked upon as other than a preference of one class of stockholders to another; as giving to the first class a perpetual, inextinguishable prior right to a portion of the earnings of the company before the other class might have anything therefrom. It was none other than the creation of a “preferred stock.”

Then there arises the query, whether there was at that time power in the corporation to distinguish between the stockholders in it, to form them into two classes, and to give to one class rights in the corporate property, business and earnings, from which the other was shut out.

We are not prepared to say that, at the first, the corporation might not have lawfully divided the interest in its capital stock into shares arranged in classes, preferring one class to another in the right it should have in the profits of the business. The charter gave power to make such by-laws as it might deem proper, consistent with constitution and law; and to issue certificates of stock representing the value of the property. We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscription thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired.

This corporation did otherwise. A by-law was duly made, which declared the whole value of its property and the whole amount of its capital stock, and divided the whole of it into shares equal in amount, and directed the issuing of certificates of stock therefor. It is not to be said that this by-law authorized anything but shares equal in value and in right; or that the taker of one did not own as large an interest in the corporation, its capital, affairs and profits to come as any other holder of a share. Certificates of stock were issued under this by-law, that gave no expression of anything different from that. When that by-law was adopted, it was as much the law of the corporation as if its provisions had been a part of the charter: *Presbyterian Church v. City of New York*, 5 Cow. 538. So it is said in Grant on Corporations, page 80, in a qualified way. Thereby, and by the certificate, as between it and every stockholder the capital stock of the company was fixed in amount, in the number of shares into which

it was divisible, and in the peculiar and relative value of each share. The by-law entered into the compact between the corporation and every taker of a share; it was in the nature of a contract between them. The holding and owning of a share gave a right which could not be divested without the assent of the holder and owner; or unless the power so to do had been reserved in some way: *Mech. Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599-627. Shares of stock are in the nature of *choses in action*, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened against the will of the owner than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right; or is properly derived afterward from a superior law-giver.

The certificate of stock is the muniment of the shareholder's title and evidence of his right. It expresses the contract between the corporation and his co-stockholders and himself; and that contract can not, he being unwilling, be taken away from him or changed as to him, without his prior dereliction, or under the conditions above stated. Now it is manifest that any action of a corporation which takes hold of the shares of its capital stock already sold and in the hands of lawful owners, and divides them into two classes—one of which is thereby given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal share afterward with the other in what earnings may remain—destroys the equality of the shares, takes away a right which originally existed in it, and materially varies the effect of the certificate of stock.

It is said that when a corporation can lawfully buy property or get money on loan, any known assurance may be exacted and given which does not fall within the prohibitions, expressed or implied, of some statute (*Curtis v. Leavitt*, 15 N. Y. 66, 67); and that is sought to be applied here. But the prohibition to such action as this is found, not, indeed, in a statute commonly so called, but in the constitutional provision which forbids the impairment of vested rights, save for public purposes and on due compensation. The right which a stockholder gets on the

purchase of his share and the issue to him of the certificate therefor is such a vested right.

It is contended that the power so to do is an incidental and implied power, necessary to the use of the other powers of the corporation, and is a legitimate means of raising money and securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money, and to secure the repayment of it, with a compensation for the use of it. But that is when it is done in such way as to put the burden upon every share of stock alike; and to enable every share of stock to be relieved therefrom alike, in such way as to preserve the equality of right and privilege and value of the shares, and maintain intact the contract thereto with the stockholder.

Citations are made to us for the converse of this; but they do not come up (sometimes in their facts, sometimes in their declarations) to the necessity of the proposition. Either it is where the capital is not limited and it is new shares that may be issued with a preference, and where there is express power to borrow on bond and mortgage: 2 Redf. on Railways, chap. 33, sec. 4, 237; *Harrison v. Mex. R. W.*, 12 Eng. Rep. 793; or the amount of the capital has not been reached and such stock is issued therefrom: *Hazelhurst v. Savannah R. R.*, 43 Ga. 53; *Tottan v. Tison*, 54 Id. 139; or there was legislative authority: *Davis v. Proprietors*, 8 Metc. 321; *Rutland R. R. Co. v. Thrall*, 35 Vt. 545; or a restriction to authorize capital, and there was unanimous consent of the stockholders: *Prouty v. M. S. and N. I. R. R.*, 1 Hun, 663; 43 Ga. 53, *supra*; or there was power to redeem, which was a transaction in the nature of a debt: *West Chester, etc., R. R. Co. v. Jackson*, 77 Pa. St. 321; or the opinion was *obiter*: *Bates v. Androscoggin R. R. Co.*, 49 Maine, 491; or it was the case of a subscription for stock with a condition for interest until the corporation was in operation: *Richardson v. Vt. and Mass. R. R. Co.*, 44 Vt. 613; or it was an action on a subscription more favorable to the defendant than to other subscribers, and it was held that defendant could not set up the lack of equality: *Evansville R. R. Co. v. Evansville*, 15 Ind. 395; or a solemn determination of this question was not necessary for the disposal of the case: *Williston v. M. S. and N. I. R. R. Co.*, 13 Allen, 400; or the issue was authorized by the articles of association: *In re*

A' D. St. Nav. and Col. Co., 20 L. R. Eq. 339; or there was full knowledge on the part of all concerned: *Lockhart v. Van-Alstyne*, 31 Mich. 81; or the power in the corporate body was conceded, and it was denied that it existed in the directors: *McLaughlin v. D. and M. R. R. Co.*, 8 Id. 100.

We will not say, for we are not called upon here to say, that never can a corporation rightfully, against the dissent of a portion of its stockholders, make some of the stock preferred; what we assent is that this case does not present a state of facts in which a power so to do exists.

There is a power in this charter to alter, amend, add to or repeal, at pleasure, by-laws before made. It is argued from this that it was in the power of the corporate body, in due form and manner, to alter the by-law which had fixed the amount of the capital stock and the number and relative value of the shares thereof. The power to make by-laws is to make such as are not inconsistent with the constitution and the law, and the power to alter has the same limit, so that no alteration could be made which would infringe a right already given and secured by the contract of the corporation. Nor was the power to alter, to the extent of affecting the contracted relative value of a share, reserved when the share was sold to the stockholder so as to enter into and form a part of the contract. An alteration is a *pro tanto* repeal; but no private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law afterward repealed. All by-laws must be reasonable and consistent with the general principles of the laws of the land, which are to be determined by the courts, when a case is properly before them: *The Master, etc., v. Green*, 1 Ld. Raym. 113. A by-law may regulate or modify the constitution of a corporation, but can not alter it: *Rex v. Cutbush*, 4 Burr. 2204; *Railway Co. v. Allerton*, 18 Wall. 233. The alteration of a by-law is but the making of another upon the same matter. If the first must be reasonable and in accord with principles of law, so must that which alters it. If, then, the power is reserved to alter, amend or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws, agreeable to law. But a by-law that will disturb a vested right is not such: See *Gray v. Portland*

Bank, 3 Mass. 363; Grant on Corps. 91. And it differs not when the power to make and alter by-laws is expressly given to a majority of the stockholders, and that the obnoxious ordinance is passed in due form.

It needs not that we consider the position that the issue of the preferred stock was an authorized increase of the capital, and so legal. It did not profess to be; nor was it in fact. For each share of preferred stock given out, a share of common stock was taken in, so that the gross amount of the capital stock was still the same and so were the number of shares and the nominal value of each share.

We are, therefore, of the opinion that there was no power in the corporate body, nor in a majority of the stockholders, to provide by by-law for the creation of a preferred stock so as to bind a minority of the stockholders not assenting thereto.

It is claimed that though there was not that power, as the facts now appear, yet that there was general authority conferred by charter to create such a stock, and that the regularity of the issue of it created a presumption of validity upon which subsequent purchasers had a right to rely, and which, in the present position of parties, can not be questioned.

It is a rule that the dealings of a corporation, which on their face or according to their apparent import are within its powers, are not to be regarded as illegal and unauthorized without some evidence tending to show that they are of that character: *Chautauqua Bank v. Risley*, 19 N. Y. 369. It is another rule, that acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter: *Nelson v. Eaton*, 26 N. Y. 410. And it may be that where a corporate act is within the general power of the corporation, and its invalidity arises from something not apparent in the grant of power to the body, and which is extrinsic thereto, that one dealing with the corporation in ignorance of that which vitiates will not be affected thereby. We need not rest there, further than such principle is involved in the next topic which we consider. We have not definitely passed upon the question whether this corporation had power in the first instance to divide its stock into preferred and common; and that would need to be settled before disposing of the proposition just noticed.

But there remains a serious question; whether, though there was at the outstart a minority of the stockholders who gave no assent to the corporate act, there has not been such tacit acquiescence and delay in action by that minority as to amount to indefensible *laches* and estoppel upon those who constituted it and their assigns. In our judgment there has; and we find here a safe place on which to rest our decisions of these cases. The findings show that the by-laws empowering the creation and issue of the preferred stock were authorized at a stockholders' meeting regularly called and held and conducted; that the stock was at once offered for subscription to all of the stockholders; that a circular informing thereof was issued by authority and distributed to the stockholders; that though all of them did not avail themselves of the chance to take it, it was not because the chance was not known; a large number of them did subscribe, and paid money for the privilege to the corporation, and that money went into the assets and business of the company; certificates for the preferred stock were thereupon issued, and it, as well as the common stock, was dealt in by the public, sales were made of the two kinds openly at the Stock Exchange, at prices for the one larger than for the other, and quoted in the daily public prints; and from year to year for four years the annual reports of the directors to the stockholders spoke of the two kinds of stock. There was ample knowledge or means of knowledge, on the part of all stockholders, of the action of the corporation in the creation of the two kinds of stock, of the issue of certificates for the preferred stock, of the entry of that stock into the channels of trade, of the public dealings in it at the especial marts for the sale of such property, and of the continued recognition of its existence and validity by the company and the public. It is not to be conceived that the owners of the common stock of this corporation did not have actual knowledge that there had been created a stock having ostensibly greater right and value than their own, and that it had gone into the market and was dealt in by the public interested in the validity of it. For the lapse of four years, however, there was no action of the company, or of an individual stockholder, to have a judicial declaration that the company had exceeded its powers in the creation of the stock, and that it was invalid. We think

that these facts, most of which are set forth in the findings in two of the cases, warrant the conclusion of law therein, that the stockholders, by acquiescing in the action of the corporation in making the preferred stock, have ratified and assented thereto, and that the same is binding on them by reason of such assent and ratification.

In the application of the doctrine of *ultra vires*, it is to be borne in mind that it has two phases: one where the public is concerned; one where the question is between the corporate body and the stockholders in it, or between it and its stockholders and third parties dealing with it and through it with them. When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts. The instance put in *Bissell v. Mich. So., etc., R. R. Co.*, 22 N. Y. 269, is illustrative. A bank has no authority from the State to engage in benevolent enterprises; and a subscription, though formally made, for a charitable object, would be out of its powers; but it would not be otherwise an illegal act; yet if every stockholder did expressly assent to such an application of the corporate funds, though it would still be in one sense *ultra vires*, no wrong would be done, no public interest harmed; and no stockholder could object, or claim that

there was an infringement of his rights, and have redress or protection. Such an act, though beyond the power given by the charter, unless expressly prohibited, if confirmed by the stockholders, could not be avoided by any of them to the harm of third persons. This arises from the principle that the trust of stockholders is not of a public nature. Per WILLIAMS, J., *Taylor v. C. & M. Railway Co.*, 2 L. R. Ex. ch. 390. These questions have been so much discussed that we need not amplify: *Whitney Arms Co. v. Barlow*, 63 N. Y. 63; *Phosphate, etc. Co., v. Green L. R.*, 7 Com. Pl. 43; *Evans v. Smallcomb*, L. R. 3 H. of L. 249.

It was not expressly prohibited by the charter, or by any statute, to this corporation to classify the shares of its capital stock, so that one class should have greater right and value than another. It was not *malum in se* so to do, unless it was that a vested right was thereby affected; but that was not a public evil; it was a wrong that affected private persons only, and one which they might assent to. This case is thus without the principle of *Ashbury Railway Co. v. Riche*, 7 Eng. & L. App. L. R. 653, where the act was expressly prohibited. And where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there it is not needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act; and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they can not be taken without loss. It is the doctrine of equitable estoppel, which applies to members of corporate or associated bodies, as well as to persons acting in a natural capacity: 2 Story Eq. Jur., sec. 1539. It is said that there is no question here between the stockholders and third parties; that it is a question between a minority of the stockholders and a majority of them or the assignees of that majority, and

so all stockholders. True, it is a question at this time between the holders of preferred stock and of common stock; but it is a question of what were the rights which those preferred stockholders took on when they were strangers to the corporation and third parties as between it and the common stockholders in it. They were not stockholders, nor the assignees of stockholders, until as third parties they bought in the market shares of the preferred stock and parted with their money therefor. It was as third parties that they in good faith relied in that action of the corporate body, and so the question is between them as such and the common stockholders, whether they shall have that right in the corporation which they thought they were to get when they went into the market and bought the right of being a stockholder.

In our view of the matter, a holder of common stock had an equitable right to restrain the privileged payment to a preferred stockholder from the profits of the company, and to have the contract therefor declared invalid. It was his duty to have been prompt in his application to the courts for that relief, before evil could fall upon innocent parties; and where application to the courts therefor has been delayed by his neglect, and advantages have been gained by the corporate body, assistance should be denied: *Zabriskie v. Cleveland R. R. Co.*, 23 How. U. S. 395-398; *Evans v. Smallcomb*, 3 H. of L. Cas. L. R. 249. It is said that the common stockholder should have some time in which to seek relief. It is enough to say in answer, that four years at least went by before a holder of common stock asked for the aid of the courts, and then not until a holder of preferred stock asked that aid to restrain proposed corporate action meant to put the common stock upon an equality with his own.

It is true, that, as a rule, the assignee of corporate stock takes no greater right than his assignor had to give, and is subject to all the equities which burden the assignor. It may be that there are some holders of preferred stock who were the first holders thereof, and some who became at an early date, owners of it by assignment from the first holders. As to those there is some plausibility in the contention of the common stockholders that they may not, in a legal sense, be injuriously affected by his delay, though the court should order

the preferred stock to be called in and canceled. But the prayer for judgment is that all of the preferred stock, in whose hands soever it may be, be so dealt with, or for action equivalent thereto. Many, probably most of the holders of it, have become so after it had been some time in the market, notoriously dealt in as a valid and recognized issue, and at prices greater than that at which the common stock ruled, and greater than would be restored to the holder by any mode of equalization now suggested. The difference in the market price of the two kinds of stock is here noticed only as being a notorious fact, which could not fail to meet the attention of holders of common stock, and to call upon them for prompt action, if they ever meant to question the validity of the preferred stock; and as showing that the equalization of the two kinds of stock, upon the basis of making good for the payment of five dollars per share, at which the preference was first subscribed for, would not restore many preferred holders to the position in which they once stood. It is not practicable to adjudge that one or some shares be called in and canceled, or equalized with the common stock, without all are so treated; and to treat all thus would be to do an injury to some persons who have acted in reliance upon the doings of the company, which have been until now unquestioned by the common stockholders.

Nor can the issue of the preferred stock, with the privilege attached to it, be said to be an executory contract. It is so only in a part of it which it remains for the corporation to do. The first holders of it made their subscriptions and paid the stipulated price; and so they executed the contract on their part, and the corporation and the common stockholder got the benefit of the execution. The stock has been issued and gone into the channels of trade. The price paid for the privilege held out by the offer of preferred stock went into the funds of the corporation, gave it relief from its needs, and aided in putting it upon a course of prosperity which enhanced the value in market not only of the preferred but of the common stock. The contract has been executed in its essential parts; there remains to be done only what is a consequence of it, the result of the purchase of the stock on the one side, and the sale of it on the other. That can scarcely be called a

contract yet to be executed, in the application to it of the doctrine of *ultra vires*, whereby one party to it has received, and used for its purposes, the stipulated consideration, and has given to the other a right which he may sell in the market. The vendees can not be put back to the situation in which they were when they bought, by any terms proposed by the corporation or the common stockholders. Both parties would not now have the same position as if no contract had been made: 63 N. Y. *supra*; *DeGross v. Am. Linen Thread Co.*, 21 N. Y. 127; 22 Id. *supra*.

We have before made mention of the position that the transaction was unconscionable and extortionate. Looking at it now, it seems to be so. In consideration of five dollars paid, the company undertook to repay seven dollars yearly for all time, if there should be enough earned to do so; which will be an enormous return. It is difficult to enter into the exact condition of things at the date of the transaction, and to estimate the propriety of such a bargain. It may be that the prospect of earnings at all, or enough to fulfill the undertaking, was too remote to be probable; and that it was a desperate chance that was taken by those who subscribed. There is some reason to suppose so, from the fact that the chance was offered to all stockholders, and that so many did not take it, though it now appears so preposterously advantageous. However that may be, an unconscionable arrangement will not be disturbed when there has been ratification of it with knowledge of all its bearings, after time has been had for consideration: 1 Story Eq. Jur., sec. 345.

It is now left to apply our conclusions to the disposition of the three cases before us.

It follows from them that in the suit of *William S. Hoyt v. The Quicksilver Mining Company, George L. Kent and others*, the order of the General Term of the second department, denying a new trial, should be affirmed; and that the judgment of the special term, dismissing the complaint on the merits and enjoining the plaintiff and all in like category, and declaring the defendant, George L. Kent, and all in like category, entitled to receive interest as set forth in the judgment; and declaring that the plaintiff and all in like category not entitled to receive net earnings, except as therein set forth;

and that the defendant, the company, render an account as therein set forth; and that the defendant, Kent, recover his costs; should be affirmed with costs. That in the suit of *George L. Kent v. The Quicksilver Mining Company, David King, Jr., and others*, the order of the General Term of the second department, denying a motion for a new trial, should be affirmed; and that the judgment of the Special Term, so far as it agrees with the preceding statement herein, should be affirmed; and that the plaintiff, Kent, recover his costs of the defendant company. In the suit of *George L. Kent v. The Quicksilver Mining Company, Daniel Drew and others*, the Special Term gave judgment for the plaintiff, with costs, which was correct. That judgment, in its terms, bound only the parties to it. The General Term of the first department in rendering judgment, in some phrases thereof, went beyond the scope of that of the Special Term, and by general description declared that persons not parties to the suit, in any way, were estopped if they gave a stockholder's vote for the resolution of February 24, 1870, or if they assented thereto, or in any way ratified it; but the General Term also affirmed in all things the judgment of the Special Term. We think that the General Term did not mean that persons not parties to the suit should be bound by the judgment; that the part of its judgment operative upon persons concerned is that which affirms the judgment of the Special Term. The judgment of the General Term should therefore be affirmed.

All concur.

Judgment accordingly.

CHEW ET AL. V. HENRIETTA MINING AND SMELTING
COMPANY ET AL.

(2 Federal Reporter, 5. Circuit Court, U. S., East. District Missouri, 1880.)

¹ **Sale of corporate bonds by agent—Application of purchase money.**

Where a corporation places its bonds before maturity in the hands of an agent with power to negotiate them, a purchaser may presume that the

¹ *Crump v. U. S. M. Co.*, 3 M. R. 454.

agent is acting within the scope of his authority, and is not bound to inquire into the application made by the agent of the proceeds of the sale. But if the purchaser is informed or has notice of intended misapplication, before purchase, he buys at his peril.

Separate estate of married woman—Notice to husband. In transactions relating to her separate estate a married woman is bound by notice to her husband only so far as he acts as her agent.

Cestui que trust—Notice to trustee. Notice to a trustee is not notice to the *cestui que trust*, where the trustee has no official relation to the transaction in controversy.

HITCHCOCK, LUBKE & PLAYER, for complainants.

M. B. JONAS, for respondents.

McCRARY, C. J. (orally).

This case is submitted upon exceptions to the report of the master. It is a bill filed to foreclose a mortgage upon 640 acres of land in this State, executed to secure 100 bonds issued by the defendant corporation. Several parties appear in this case, claiming to be owners of some of these bonds. The master has reported his conclusions with regard to the title of each of the claimants. The only questions presented relate to the title of the plaintiff Chew, and the defendant Burch. Chew claims to be the owner of several of these bonds, and the master finds that he has no title. There is an exception to his finding. Burch claims to own a large number of them and the master finds in his favor. There is an exception also to this finding. The bonds are negotiable, and, according to the repeated decisions of the Supreme Court of the United States, they have all the qualities of negotiable commercial paper. They were placed in the hands, a portion of them, at least, of one Muir, with authority to negotiate them for the benefit of the corporation. I think the language of the resolution of the corporation was "for the purpose of raising money to develop the mines."

Muir held these bonds in New York as the agent of the corporation, with this authority, and no other. He placed some of them in the hands of a man by the name of Dever, who transferred them to plaintiff Chew, in order to raise money; not, however, for the corporation, but for Muir's private purposes. Of course the question here is, and the only

question is, as to notice. Where a corporation places its bonds in the hands of an agent, with power to negotiate them, and puts them in that way upon the market before maturity, the purchaser has a right to presume that the agent is acting within the scope of his authority, and is not bound to inquire into the application he is to make of the proceeds of the sale. But if the purchaser is informed upon this subject, and has notice, then, of course, he takes them at his peril. The proof upon this point, so far as Chew is concerned, is found in his testimony, quoted by the master, as follows:

“Interrogatory 4. Did said Dever state for whose account he applied for loans on said bonds? *Answer.* Yes. He said the bonds were owned by William Muir, or held by William Muir; that said Muir was the agent of the Henrietta Mining and Smelting Company, at New York; that \$100,000 of said bonds had been prepared for issuance by said company, the proceeds of sale of which were applied to the purchase of machinery to work the mine, which he said was located near Potosi, in the State of Missouri; he said further that William Muir was pressed for funds, and had requested him to make loans for him (Muir) on the said bonds.”

I agree with the conclusion of the master that upon that statement Mr. Chew was fully informed, not only as to the nature and extent of Muir's authority, but of the fact that he was violating it in so placing the bonds for the purpose of raising money for his own purposes, and not for the corporation; and, on that ground, the exception to the report, so far as that part of it is concerned, is overruled.

As to the other part of the case—the title of the defendant Burch to the bonds represented by him—I have had more difficulty. But in this case, as in the other, it is simply a question of notice; and I believe the rulings of the Supreme Court go so far as to hold that there must be something amounting to bad faith on the part of the purchaser before his title to negotiable paper of this kind, purchased in the open market, can be defeated. An important fact in the case, as bearing upon the question of good faith, is this: Mrs. Burch advanced money—the title of the present defendant being derived from Mrs. Burch, of course the question is as to her title—to the secretary of the company, and to her husband, for

the purpose of paying a debt for which the corporation was liable in equity. The debt was created for the purchase of this very real estate which is now in controversy. It was taken in the name of Edgerton, the secretary of the company, and Burch, as a mere matter of convenience, I apprehend, and they advanced on the payment of the purchase money something over \$2,000, and then conveyed it to the corporation.

Now, it was to pay this money, by them advanced, that Mrs. Burch made the loan now in controversy. I say this has an important bearing upon the question of good faith, because it might well have been believed by Mrs. Burch that the secretary of the company had authority to use the bonds of the company for the purpose of raising money to pay this debt, which was a debt, in equity at least, against the corporation. Then, again, she received the bonds from the secretary of the corporation, and, I believe, it has been repeatedly held by the Supreme Court of the United States, and perhaps by other courts, that a purchaser of the bonds of a corporation may presume that an officer of the corporation, acting in the capacity of an agent of the corporation, is acting within his authority, unless actual or constructive notice is brought home to such purchaser.

But it is said that the husband of this lady knew the facts, and that notice to the husband is notice to the wife. I think, however, that this is not true for all purposes. When a married woman is acting or contracting with reference to her separate estate, it is well settled that she is to be regarded as a *feme sole*.

In regard to such transactions, especially under the more modern and enlightened view of the subject, she is as independent of her husband as he is of her. She is bound, then, in such transactions, only by notice given to him in so far as he acts as her agent. The Supreme Court of Missouri has stated this doctrine in the sixty-seventh volume of the Missouri Reports, page 601, in the case of *Morrison v. Thistle*, as follows: "In equity, husband and wife are not, in a large number of cases, regarded as one and the same person. They, for this reason, may sue and be sued, contract and be contracted with, and become the creditor or debtor of each other with like

effect, so far as regards equitable contemplation and rights, as if they had never become one flesh," citing numerous cases.

Now, there is no proof that Mrs. Burch had any information with regard to the authority of the secretary of this company, except that she was assured that the transaction was all right and proper, and acted upon the faith of that assurance. Her husband was, in this case, in no sense her agent; on the contrary, he dealt not for her but with her; was one of the parties asking the loan from her, and I think, therefore, that this is not a case in which the doctrine of notice to the husband is notice to the wife, can have any force. It is also insisted that the trustee of Mrs. Burch, with respect to her separate estate (De Cordova), knew the facts, and that notice to him is notice to her; that is, that notice to the trustee is notice to the *cestui que trust*. The answer to that is that De Cordova, although her trustee with regard to her separate estate, was not her trustee with reference to this transaction at all. Holding as he did the naked title to her lands, and for her use and benefit, he joined with her in making the mortgage for the money to be loaned to these parties; but that was a separate transaction from the matter now in controversy, to wit, the hypothecation of these bonds, and with that the trustee had nothing to do.

The result of my examination of the case is that the exceptions to the report of the master must be overruled.

Exceptions overruled.

CROWLEY V. THE GENESEE MINING COMPANY.

(55 California, 273. Supreme Court, 1880.)

Contract, authority of agent.—The appointment of an agent for a corporation to make a contract for work and labor or service, upon the property of the corporation, need not be made under seal or by resolution of the Board of Directors, but his authority can be inferred from the admitted relations of the agent to the corporation, or from the course of business of the corporation itself.

Appeal from an order denying the defendant a new trial, in the Twenty-first District Court, County of Plumas.

CLOUGH, J.

J. C. CHAPMAN, and J. D. GOODWIN, for appellant.

The authority of Quin to make the contract could not be implied from his admitted relation to the defendant: *Gashwiler v. Willis*, 33 Cal. 11; *Yellow Jacket v. Stevenson*, 5 Nev. 224. It was competent for the defendant to show that it never authorized or ratified the execution of the contract. The president, managing agent and superintendent of a corporation can not, by reason of such relation, bind the corporation: *Hall v. Auburn T. Co.*, 27 Cal. 255; *Blen v. B. R. & A. Water & M. Co.*, 20 Id. 602; *Richardson v. S. R. W. & M. Co.*, 22 Id. 150.

W. W. KELLOGG, R. H. F. VARIEL, and HAYMOND & ALLEN, for respondent.

The authority of Quin to make the contract is established from his admitted relations to the corporation: 37 Cal. 599; Civ. Code, §§ 2307, 2310, 2311, 2319, 2332, 2338; *Jones v. Clark*, 42 Cal. 180.

McKEE, J.

On the trial of this case in the court below, it was admitted that one M. J. Quin was the president of the corporation, defendant in this case, and the superintendent and managing agent of its mines in Plumas County and had full control of its business in that county, its principal place of business being in the city of San Francisco. It was proved that he was the principal stockholder in the company. On the 11th of September, 1877, Quin employed the plaintiff to work in a quartz mine in Plumas County, belonging to the defendant, for the purpose of taking out what is known as "tribute rock," and delivering it at the defendant's quartz mine, to be crushed by the company at its mill, free of cost or expense to the plaintiff; and, as compensation for his services one half of the gross amount of the proceeds of each crushing was to be paid to the plaintiff. On the 12th of September, 1877, the plaintiff went to work under this agreement of taking out rock from

the mine, and continued to work for the defendant until January, 1878, when he was discharged by Quin.

Two crushings were made by the defendant, of rock taken out and delivered by the plaintiff: one on the 25th of October, 1877, and the other on the 7th of February, 1878. Of the proceeds of the first crushing, the plaintiff was paid according to the terms of the agreement. From the last crushing there was realized fifty and two eighths ounces of gold-dust, which was sent to the San Francisco mint for coinage; and after paying all expenses and mint charges, there was due to the plaintiff over \$400, which the defendant failed or refused to pay to the plaintiff; and hence this suit.

It is objected by the corporation, that the agreement which was made with the plaintiff by its president, superintendent and managing agent, is not a contract, but a lease. But the agreement is a contract of employment under § 1965, Civil Code; and it is binding on the defendant if Quin had authority to make it. Plaintiff does not rely on the existence of an authority of record; he did not claim or prove that the board of directors of the defendant had by resolution or order authorized Quin to make such a contract, or that the latter had ever informed the directors that he had made it. He himself claimed that Quin had authority from the admitted relations existing between him and the defendant.

Upon this theory the case was tried in the court below; and when the defendant offered to prove by Quin that the board of directors never authorized him to make such a contract with the plaintiff or any one else, and that he never informed the board of the execution or existence of the contract, and that the directors knew nothing of it, the court sustained an objection to the offer, and afterward refused to give the following instruction to the jury: "Neither the president, superintendent, nor the managing agent of the corporation can, by virtue of their said offices, execute such a contract binding the corporation." And, while the court gave the following instruction to the jury, which was asked by the defendant, viz.: "If you believe, from the evidence, that the said Quin, as the managing agent or the superintendent of the defendant, entered into the contract charged in plaintiff's complaint, before you can hold this defendant liable for a breach of said

contract, you must further find that either the board of directors authorized said Quin to make such contract, or that, after being informed of the nature of said contract, the board of directors ratified the same"—yet it accompanied the instruction with the following modification, viz.: "But the fact that such authority was given to the superintendent may be inferred from his admitted relations to the corporation defendant."

The question therefore arises, whether the appointment of an agent for a corporation to make a contract for work and labor, or services, upon the property of the corporation, must be made under seal or by resolution, or whether it can be inferred from the admitted relations of the agent to the corporation, or from the course of business of the corporation itself.

The common law rule, that a corporation has no capacity to act, or to make a contract, except under its common seal, has been long since exploded in this country. Even in England, it has been found to be impracticable, so that the classes of cases which constitute exceptions to the rule have become so numerous that the exceptions have almost abrogated the rule. In the United States, nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts. "If this were not so," says Mr. Chief Justice Redfield, "it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations in this country, is without any formal meetings or votes of the board. Hence, there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted. If this were not done, it would become impossible to dispose of such contracts with any hope of reaching the truth and justice of the rights and duties of the several parties involved. * * * This is merely holding corporations to such rules of action as they see fit to adopt for their own guidance and the transaction of their business": *Bank of Middlebury v. Rutland R. R. Co.*, 30 Vt. 159. When, therefore, the defendant admitted, on the trial of the

case in hand, that Quin was its president and superintendent, and general managing agent, this was sufficient evidence of his authority to make the contract with the plaintiff, and it was not necessary for the plaintiff to show any vote, or other corporate act, constituting him the agent of the corporation. It would not be in accordance with justice, or the interests of society, to allow corporations to deny the authority of such agents, or to repudiate contracts made by them for work and labor from which they derive benefit. So in *Goodwin v. The Union Screw Company*, where it appeared that the business of manufacturing screws was conducted under the general management of one of its directors, who made a verbal contract with the plaintiff to work in the shop, at manufacturing screws for the defendant, the Supreme Court of New Hampshire held, that where one has the actual charge and management of the general business of a corporation, with the knowledge of the members, or the directors, this is sufficient evidence of authority, and the company will be bound by his contracts made on their behalf, within the apparent scope of the business intrusted to him: 34 N. H. 378. And in *Boyington v. The Wilson Sewing Machine Company*, where it appeared that an architect had drawn plans for a building for a corporation, under a verbal contract made with one who was acting as president, executive manager, and principal stockholder of the company, the Supreme Court of Illinois held that the contract was binding upon the corporation. "A corporation," says the court, "which suffers appearances to exist, and its officers and agents to so act, as to give one employed by such officers and agents reason to believe that he is employed by the company, becomes liable to such person as his employe to pay for the services rendered": 73 Ill. 534. See also, 29 Ala. 21; 7 Cranch, 309; 8 Wheat. 338; 12 Id. 64.

Hence, the court below did not err in rejecting the evidence which was offered by the defendant or in overruling the defendant's motion for a nonsuit, or in refusing to give to the jury the instructions which the defendant requested, or in modifying those which were given at the defendant's request.

Order affirmed.

Ross, J., and McKINSTRY, J., concurred.

HUMPHREYS, impl., etc., v. MOONEY.

(5 Colorado, 282. Supreme Court, 1880.)

¹ Validity of incorporation—Omission in certificate. As a general rule it is quite well settled that the validity of the existence of a corporation can not be questioned collaterally. The omission from the certificate of incorporation of the latter clause in section ninety-three of the incorporation act, as to the assessability of the stock of a mining corporation, can not, in the absence of fraud, be regarded as essential to the corporate existence in an action by one against the individual members upon a contract with the company.

Obligation accepted from corporation—Presumption. One accepting the obligation of a company as the engagement of a corporation clothed with statutory liability only, and treating with them as such, is presumed to have known the extent of that liability, and to have acted with reference thereto.

Individual liability of incorporators. No provision is made by which individual liability attaches to members of a corporation by reason of any omission to organize in the manner prescribed by the incorporation act.

Non-resident incorporators—Filing certificate. The statute does not require that the incorporators or officers shall be residents of the State, nor that the certificate of incorporation be executed within the limits of the State; nor does the statute in terms require a meeting of the incorporators prior to the execution of the certificate; such execution under the statute is analogous to the execution of a deed of conveyance, and is of no validity without delivery. It is the filing of the certificate that brings the corporation into existence.

Meeting of directors out of State. Under the Colorado statute meetings of directors may be held beyond the limits of the State, if provision therefor be made in the certificate of incorporation.

Stockholders meeting out of State—Collateral attack. The annual meeting of the stockholders for the election of directors without the State, although irregular and illegal, can not be taken advantage of in a collateral proceeding by either the corporation, or one contracting with it as such.

Directors by operation of law. The persons who are named by the incorporators in the certificate as directors for the first year are created such directors by operation of law, and not by election of the stockholders after the corporation is formed.

Failure to file duplicate certificate. While a failure to record a duplicate of the certificate of incorporation in the county where the operations of the company are carried on may be such a non-compliance with the law as would authorize the people to sustain a writ of *quo warranto*

¹ *Dannebroke Co. v. Allment*, 26 Cal. 286; *Doyle v. Peerless Co.*, 44 Barb. 239; *Post Trust*.

or *scire facias*, and to oust the corporation from the exercise of their franchise, yet it does not follow that as to third persons it is not a corporation.

Appeal from District Court of Arapahoe County.

The facts are sufficiently stated in the opinion. The plaintiff below had judgment.

ROCKWELL & BISSELL, and J. E. ROCKWELL, for appellant.

WELLS, SMITH & MACON, for appellee.

STONE, J.

The first question presented in this case, is whether the appellee, the plaintiff in the court below, could question the validity of the corporation, in a suit upon a contract he had made with it.

A few cases may be found in which, under the given facts, the legal existence of a corporation has been allowed to be questioned in a collateral proceeding; but as a general rule it seems quite well settled that the validity of the existence of a corporation can not be questioned collaterally.

Several distinctions, however, have been made in the cases covered by both the general rule and the exceptions, dependent upon the conditions of the charter, the terms of a general incorporation statute, whether the suit is between the corporation and one of its members, or a stranger, what the particular object of the suit may be, and whether the *de jure* existence of the corporation is sought to be questioned, or whether it be the regularity of the organization of a *de facto* corporation that is attacked.

Without going into an examination of the cases to illustrate all these distinctive phases of the subject, it is sufficient to notice only the most important distinctions bearing upon the case in hand—the difference between the illegal existence of a corporation *ab initio* on the one hand, and on the other hand an assumed corporation based upon a charter or statute lawfully authorizing it, but irregularly or defectively organized.

In the former case it has been held that one dealing with a corporation is not estopped to deny its legal existence on the ground that there is no valid law or authority for the organ-

ization, or that the assumed organization was in the face of a prohibition by statute *nisi*, in that there was a failure to comply with an express condition precedent requiring certain acts to be performed before the corporation can be considered *in esse*, or its transactions possess validity: *Mokelumne H. M. Co. v. Woodbury*, 14 Cal. 427; *Lessee of Frost et al. v. Frosburg Coal Co.*, 24 How. 283; *Heaston v. Cincinnati, etc., R. R. Co.*, 16 Ind. 279; *Abbott v. Omaha Smelting Co.*, 4 Neb. 423; *Hildreth v. McIntire*, 19 Am. Deci's and notes, 67; *Stowe v. Flagg*, 72 Ill. 401.

In *Heaston v. Cincinnati R. R. Co.*, *supra*, it is said that the issue of *nul tiel corporation* is upon the existence of a *de facto* corporation where it is *de jure* authorized, and that upon this fact rests the doctrine of estoppel to deny the existence of the corporation in certain cases, the estoppel goes to the mere *de facto* organization, not to the question of legal authority to organize.

While some diversity of opinion is found in the courts of different States as to when the existence of a corporation may be questioned, if at all, in a collateral proceeding, the authorities are almost unanimous in holding that such collateral inquiry can not be made touching the corporate existence of a *de facto* corporation where there was lawful authority for its creation: *Cochran v. Arnold*, 58 Pa. St. 405; *Rondell v. Fay*, 32 Cal. 354; *Baker et al. v. Adm'r of Backus*, 32 Ill. 110; *Tarbell v. Page et al.*, 24 Ill. 46; *Jones v. Cin. Type Foundry*, 14 Ind. 89; *Hubbard v. Chappel*, Ibid 601; *Heaston v. Cin., etc., R. R. Co.*, 16 Ind. 279; *Mokelumne H. M. Co. v. Woodbury*, *supra*; *Washington College v. Duke*, 14 Iowa, 17; *Slocum v. Providence, etc., Co.*, 10 R. I. 114; 1 Redfield Law of Railways (5 Ed.), 73; Ang. & Am. Corp. (10 Ed.) Sec. 635.

In the case before us, the appellee, Mooney, brought an action against Humphrey, together with other persons, members of an assumed corporation, to recover a sum of money due upon an obligation given therefor by said company, through its agent, and it is sought to hold the defendant, Humphrey, individually liable as a partner, the defendants being declared against as partners. Defendant's answer denies the alleged partnership, and sets up the corporation, or-

ganized under the general incorporation law of Colorado as the Trenton Dressing and Smelting Company. Plaintiff replies, averring the non-existence of the corporation. The evidence in support of this averment rests upon certain omissions in the articles of incorporation, and alleged irregularities in the organization of the company as a corporation.

In the case of *Baker et al. v. The Adm'r of Backus, supra*, where a bill was filed against certain defendants, who purported to form a corporation, but who, as alleged, had not complied with the statutes, and the prayer of the bill was that the company be decreed to be a general copartnership; or if it should be declared a corporation, then to be dissolved by order of court, the opinion gives, besides the general rule that a direct proceeding on behalf of the State is necessary in such case, the additional reason that the corporation should be made a party defendant to the action. "All bodies should be allowed the privilege of being present at their own dissolution," is the rather striking and forcible language used by Mr. Justice Breese upon this point.

The principal point relied upon as ground for alleged non-compliance with the statute and consequent illegality of the corporation, is based on the latter clause of Sec. 93 of the corporation law of Colorado relating to mining companies, and which reads as follows:

"The certificate of incorporation of any such company, in addition to the other matters required in this act to be stated therein, shall contain a statement that the stock of such company is either assessable or non-assessable, and each certificate of stock issued by any such company shall have plainly printed on the face thereof the word 'assessable' or 'non-assessable,' as the case may be."

This statement was omitted in the articles of incorporation of the Trenton Dressing and Smelting Company, and this is urged as fatal to the legal existence of the company as a corporation.

By reference to the 2d and 3d sections of the Corporation Act, it will be seen that after enumerating the specifications which the articles of association shall contain, it is provided that a copy shall be filed with the Secretary of State, and a copy with the recorder of each of the counties where the prin-

cipal business is to be carried on, and that when so filed the Secretary of State shall record and preserve the same in his office, and that a certified copy thereof under the seal of the State shall be evidence of the existence of the company.

It will be observed that none of the statements which the certificate of information is directed to contain, are required to be made as condition precedent to the commencement or continuance of business by the corporation.

In the case of *Abbott v. The Omaha Smelting Company, supra*, cited by the appellee as an authority against the validity of the corporation, the decision turned upon the particular language of the statute of Nebraska, which required that the corporation "previous to the commencement of *any* business except its own organization" * * * must adopt articles of incorporation and have them recorded in the office of the clerk of the county, etc., and it was held that the company was not in existence for the purpose of transacting business as a corporation until such record had been made, and the court point out the distinction between that case and the California case of the *Mokelumne Co. v. Woodbury, supra*, wherein it is laid down that "there is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisite to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter. The right * * * to be considered a corporation and the exercise of corporate powers depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence."

The case before us certainly falls within this latter class. The specification respecting the assessability of the stock can not, in the absence of fraudulent intent, be regarded as essential to the corporate existence in this case. What the relative importance may be in the several statements directed to be

set forth in the articles or certificate of incorporation, or whether the omission of any one or more of them might be considered fatal to the existence of an assumed corporation, or its right to the exercise of corporate powers when inquired into by a direct proceeding for that purpose, we need not now determine.

The evidence in the case embracing a certified copy of the duly recorded certificate of incorporation, containing all the statements enumerated in the statute, except the one in controversy, together with acts of *user*, at the place where the works of the company were located, was sufficient to establish the conclusion that the company was, at the date of the transaction with Mooney, a corporation *de facto*, vested with the power and right to the exercise of all the acts contemplated under its franchise, so far as regards the relation between it and the plaintiff, whose contract with it as such, estops him to now deny its existence as such *de facto* corporation: *Eaton v. Aspinwall*, 19 N. Y. 121; *Buffalo R. R. Co. v. Cary*, 26 N. Y. 77, and cases cited, *supra*.

Since the validity of the corporation to make the contract in question is thus clearly established, it follows that the defendant, Humphreys, as a member of the corporation contracted with, can not be held liable as a partner, nor indeed does it follow as a rule of law, if the legal existence of the corporation could be attacked and overthrown collaterally or otherwise, that the members of such *de facto* corporation would be liable as members of a copartnership. The facts in a given case may sometimes warrant a holding of partnership liability, as where an already constituted partnership seeks to become incorporated, and exercises corporate powers without color of right, or where an associated company by deceit or misrepresentation, fraudulently attempts to evade individual liability through a false assumption of pretended corporate authority, or where in respect to the transaction in controversy a corporation in fact *intended* to assume partnership liability, and especially where, in consideration of such known or supposed intent, the other party was induced to act in entering into the contract.

I am aware that there is considerable diversity of opinion in the decided cases upon this point. The case of *Fuller v.*

Rowe, 57 N. Y. 26, is an authority for the broad doctrine that parties assuming to act in a corporate capacity without a legal organization as a corporate body, are liable as partners, with the limitation only that the party so held liable must have been a member of the company at the time the contract was made.

In the case of *Whipple v. Parker*, 29 Mich. 380, where a company organized as a partnership in fact, and had been doing business as such, some time prior to the execution of articles for a corporation, the court say: "Certainly, if they were already a partnership before the attempt to form a corporation, they would not by the failure of this attempt cease to be a partnership, but the attempt failing, the partnership continued."

If the opinion thus expressed was decisive of the question under consideration, and it seems to be intended as such, it greatly weakens the force of what the court immediately add, as follows: "But suppose they were not a partnership and had not acquired property or done business until these articles were executed, if the articles failed to make them a corporation, then I am inclined to think they would, in legal effect, by thus associating themselves together in the purchase of the property for the purpose of carrying on the business, and in carrying it on, become partners in that business."

It is to be remarked, however, that the suit in that case was for the purpose of equitably settling the respective rights of members of the company to property contributed to the general fund.

In the case of *Abbott v. The Omaha Smelting Company*, cited *supra*, which involved the question of the partnership liability of Abbott, as a member of a company which was held not to have been a corporation either *de jure* or *de facto*, the court upholds the instruction of the court below which submitted the question of such partnership liability to the jury, as a fact to be determined upon the evidence touching that point.

It is held in *Tarbell v. Page et al.*, 24 Ill. 47, that the dissolution of a corporation does not change the relation of the stockholders to the creditors of the company; that it does not operate to convert them into mere partners; and that their

liability as stockholders is not changed beyond that imposed by statute.

The case of *Stowe v. Flagg et al.*, 72 Ill. 397, is very like that of *Whipple v. Pearson*, *supra*, involving the property rights, *inter sese*, of parties who had associated in writing for a manufacturing purpose, and had failed in an attempt to become a corporate body, and the court held that the property involved had never been changed into corporate property, but that under the facts in the case, belonged to the parties as an association under their united agreement.

In *Hubbard and Wife v. Chappel*, 14 Ind. 601, it is held, that if the name in which the contract may have been made simply *prima facie*, imply a corporation, while in fact the company is not assuming to be a corporation, but only a partnership, this fact may be shown.

The case of *Fay et al. v. Noble et al.*, 7 Cush. 189, is a strong authority and directly in point, that a partnership liability does not attach to the members of an irregularly organized or illegally assumed corporation.

In the case at bar there is no charge of concealment, misrepresentation or fraud on the part of the company nor any of its members, nor the agent through whom the contract was made. There is no evidence of intent on the part of the company to assume a partnership liability, nor that the appellee supposed there was any such assumption. He accepted the obligation of the company as the engagement of a corporation clothed with a statutory liability only. Treating with it as such, he is presumed to have known the extent of that liability, and to have acted with reference thereto. The doctrine of a partnership liability in such a case is not founded in law or reason, and is repugnant to the very purposes of the statute authorizing a corporation, one object of which is to limit individual liability. "It can not be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily for such a cause, the enlarged liability of copartners; a liability neither contemplated nor assented to by them. The very statement of the proposition carries with it a sufficient refutation. * * * Corporations are known and recognized legal entities, with rights and powers clearly defined and well understood, and wholly distinct and different

from those of individuals and copartnerships. Persons who subscribe for and take stock in them are subject to certain fixed and limited liabilities which they voluntarily assume, and those liabilities are not to be enlarged so as to affect innocent parties beyond the letter of the law. A copartnership can not take upon itself the functions of a corporation, nor can the latter or its members be made subject to the liabilities of a copartnership in the absence of statutory provisions imposing such liabilities. The personal liability of a joint stock company or copartnership is inconsistent with the character and nature of a corporation, of which the law properly recognizes only the creature of the charter, and knows not the individuals": *Fay v. Noble, supra*.

Looking into the statutes, to the provisions of which the corporation in question was made subject, we find various enactments by which officers and members are made individually liable for debts contracted by corporations in case of non-compliance with certain requirements, but no provision is made by which such individual liability attaches by reason of any omission to organize in the manner prescribed by the incorporation law. The statute, it is true, prescribes the mode of organization, and what the articles of incorporation or charter certificate shall contain, but annexes no penalty or liability to the neglect or omission to strictly comply with it.

Corporations as a rule, and especially in this State, where so very many are created under our general incorporation law representing and controlling the largest share of the wealth and industries of the State, and bearing either good or bad fruit, according to the character and purpose of the body, should be held to a strict accountability for their corporate acts. Many of these, doubtless, are liable to a decree of dissolution and forfeiture of their franchise in a proceeding for that purpose; while on the other hand, considering not alone the mere legal rights of corporations, but that owing to the peculiar nature of our mineral and other resources of wealth and industry, that depend for their successful development upon such aggregation of capital, intelligence and unity of action, wherever a body of persons becomes lawfully incorporated or makes a *bona fide* attempt so to do, and by actual user and honest intent, evinces the legitimate purpose of such organi-

zation, no strained construction ought to be interposed against affording acknowledged protection to the corporate rights of stockholders who contribute their means to useful enterprises.

It is also objected against the validity of the Smelting Company that its corporators and officers were non-residents of this State; that the subscription and acknowledgment of the articles of incorporation were made, and meetings of the officers were held at a place without the State. These objections, we think, are not well founded. There is nothing in the statutes requiring corporators and officers, any more than stockholders, to be residents of the State granting the charter, and, indeed, it would be a rather strange law if there were such an one. But even such a provision would, in the case of a *de facto* corporation, be met by the authority of the Supreme Court of Pennsylvania in the *Delaware & Hudson Canal Co. v. The Penn. Coal Co.*, 21 Pa. St. 131, 146, where it is held, that "conceding that the president and managers of the Pennsylvania Coal Co. at the time of entering into the contract were resident citizens of New York, and not residents or citizens of Pennsylvania, and that they were therefore ineligible, it does not follow that the agreement is not binding on the defendant. The officers may have been ineligible, but this can not be taken advantage of in this collateral proceeding. It is sufficient for the plaintiff and all third persons that they have dealt in good faith with the officers *de facto*."

The subscription and acknowledgment of the articles of incorporation, properly authenticated, may, we think, be made without as well as within the State. The corporation submits itself to the laws of Colorado when it assumes to incorporate and act thereunder in substantial compliance with the statute.

Our statute does not in terms require the certificate of incorporation to be executed within the limits of the State, nor does it in terms require a meeting of the corporators prior to the execution of the certificate.

The essential prerequisites to the formation of a corporation are a certificate in form and substance as prescribed by statute; that it be signed by the corporators; that it be acknowledged before some officer competent to take acknowledgments of deeds, and that it be filed in the office of the Secretary of State,

and a copy in the office of the recorder of deeds of the county in which the principal business is to be carried on. The chapter on conveyances provides the manner in which, and the officers before whom conveyances and contracts affecting title to real property may be acknowledged without the State, as well as within the State. The execution of a certificate of incorporation under the statute, is analogous to the execution of a deed of conveyance, and neither instrument is of any validity without a delivery.

It is the filing of the certificate that brings the corporation into existence. This instrument may contain all that the statute requires, its execution may be wholly regular, but the performance of these acts does not constitute a corporation. The mere certificate, like an undelivered deed, is without validity or force—it may be retained by one of the makers, or it may be destroyed—but when filed as the law requires, and recorded in the office of the Secretary of State, the statute declares that “a copy thereof, duly certified by the Secretary of State, under the great seal of the State of Colorado, shall be evidence of the existence of such company.”

As respects the holding of meetings of directors beyond the limits of the State, section 18 of the Corporation Act provides that such meetings may be lawfully held, provided such provision is made in the certificate of incorporation.

Upon examining the copy of the certificate set out in the record, it is found to contain in its statement of the places where the business and operations of the company are to be carried on, the following provisions: “*Sixth*—The operations of our said company shall be carried on at or near Golden City, Jefferson county, State of Colorado, where the principal office shall be kept, with the privilege of a branch office in the city of Trenton, State of New Jersey, for the holding of meetings of stockholders and directors, and for the transaction of such business as the best interests of the company may require.” Meetings, therefore, of the directors were regular without the State.

Section 6 of the corporation law provides for the election of the directors annually by the stockholders, “at such time and place as shall be directed by the by-laws of the company.” Conceding that meetings of the stockholders without the

State, although so directed by the by-laws of this company, are not within the saving clause of the 18th section of the statute referred to, and were therefore irregular or illegal, such act, while a violation of the statute, being such, not by express inhibition, but by construction of its contemplated meaning and upon principle, comes within the rule already laid down respecting irregular organization—that it can not be taken advantage of in a collateral proceeding by either the corporation or one contracting with it as such.

It is also to be observed that the persons who are named by the incorporators in the certificate as directors of the company for the first year, are created such directors by operation of law, and not by election of the stockholders after the corporation is formed, and hence it might be possible for the corporation to begin and go on in business for a year without any meeting of the stockholders, such directors, under the provisions of sections 5, 6, 7 and 8, being empowered to choose the president and other officers, adopt by-laws, and “manage the affairs of such company for the first year of its existence.”

The omission to record a duplicate of the certificate in the county where operations of the company were carried on, is met by the case of the *Mokelumne H. M. Co. v. Woodbury*, 14 Cal. 426, and also by the case of *Turbell v. Page*, 24 Ill. 46, which is still stronger, there being in that case no certificate filed with the Secretary of State, and the court say:

“Whilst it may be true that a failure to file this certificate in the Secretary of State’s office may be such a non-compliance with the law as would authorize the People to sustain a writ of *quo warranto* or *scire facias*, and to oust the incorporators from the exercise of their franchises, it does not necessarily follow that it is not, as to third persons, a corporation.”

The judgment in favor of appellee rendered by the court below is for these reasons erroneous, and must be reversed.

Judgment reversed.

THE COYOTE GOLD & SILVER MINING Co. v. RUBLE
ET AL.

(8 Oregon, 284. Supreme Court, 1880.)

Premature action of organizers. The organizers of a corporation can not, by their action before the completion of the incorporation and the election of directors, dispose of the future earnings of a corporation, or control the action of the directors to be elected.

Premature assessments. Stock can not be assessed before the election of the Board of Directors.

Election of directors. The election of directors is a condition precedent to the perfect organization of a corporation (under Oregon statute), but it may, before such election, become the holder of property.

¹ Contracts of organizers. Contracts of the organizers do not bind the corporation unless adopted or ratified by it upon the perfection of its organization.

First existence of corporation. A corporation exists as a legal entity from the time of the filing of its articles.

An agreement to subscribe for stock does not amount to a subscription, nor does such agreement authorize the secretary of the company to place the signers' names among the list of stockholders. To bind a party as a stockholder he must directly subscribe for stock or authorize a subscription on his account.

Estoppel. There is no estoppel between a corporation and the subscribers to its stock; and its action to recover subscriptions may be defeated upon inquiry into the conditions upon which the subscriptions were made.

Placer claims worked by same water. R., one of the prominent organizers, purchased, with his own money, claims which were to be transferred to a mining company; and also other claims so situate as to prevent the proper working of the company claims: *Held*, that, upon tender, he must convey all such claims to the company even if he had not become finally bound as a subscriber to the company.

Appeal from Jackson County.

This is a suit to enforce a trust concerning real property, and for an injunction and damages against the appellants. The respondent corporation was incorporated for the purpose of owning and working certain placer mining claims, with a

¹ *Peru Coal Co. v. Merrick*, 79 Ill. 113, and see 3 M. R. 583.

capital stock of two hundred thousand dollars, in shares of the par value of one dollar each. The complaint alleges that the claims and property in question were, at the date of the incorporation, to wit, August 27, 1878, owned by the several following named parties, each owning certain distinct parcels thereof: O. Jacobs and H. Kelly, Ash and McWilliams, P. H. O'Shea, Davis and Rathbon, John Robertson and Daniel Mathews. That the appellant, Wm. Ruble, as a subscriber to the capital stock of the incorporation, obligated himself to, and promised and agreed to pay upon his subscription for fifty thousand shares of the capital stock, the sum of ten thousand dollars—seven thousand dollars thereof down, and three thousand dollars on or before the first day of November, 1878, and the further sum of twelve thousand five hundred dollars when realized out of one half of the net proceeds of one fourth interest of the said mines. That Ruble agreed and promised to pay the said sum of money to the persons then owning the said mining claims, to apply upon the consideration to be paid therefor for the use and benefit of the corporation, and to take and receive from such of said owners, to whom such payment should be by him made, conveyances to the company for such portions of the said mining claims, lands, property, fixtures and appurtenances as should be by him paid for.

That on or about the fourth day of September, 1878, Ruble did, in accordance with his promise, and in pursuance of the trust reposed in him, pay upon his subscription the sum of nine thousand five hundred and fifty dollars, and of other money belonging to the company the sum of seven hundred and fifty dollars in the following amounts, to the following named parties, to wit: Davis and Rathbon, two thousand dollars; Ash and McWilliams, four thousand dollars; P. H. O'Shea, three thousand three hundred dollars, and John Robertson, one thousand dollars. That he, Ruble, took from such parties, conveyances of the property in question, to himself, instead of to the company, and that on the twenty-seventh of November, 1878, he fraudulently conveyed to the appellant, Walter Ruble, the mining claims, ditches, water rights and flumes, known as the Davis and Rathbon and John Robertson claims, which had been conveyed to Wm. Ruble

as aforesaid; that Walter Ruble took with knowledge of the trust and without consideration.

Wm. Ruble answered and denied all the material allegations of the complaint except the existence of the corporation, which it is alleged was constituted on the sixth day of September, 1879, and alleges that he is damaged by reason of the injunction sued out in the sum of ten thousand dollars, and demands judgment accordingly.

Walter answers by denying the allegation of the complaint and claiming damage by reason of the injunction in the sum of eight thousand dollars.

The Circuit Court decreed a conveyance of the property to the company and adjudged damages in its favor in the sum of four thousand dollars.

JOHN KELSEY, J. F. GAZLEY, and THAYER & WILLIAMS, for appellants.

C. W. KAHLER, A. C. JONES, R. MALLORY, W. H. HOLMES and J. H. REED, for respondent.

By the court, BOISE, J.

The issues of fact presented by the pleadings are:

1. Was William Ruble a stockholder in the corporation of fifty thousand shares of the capital stock?
2. If he was such owner, did he become legally liable to pay the same to the corporation before he bought the land in question?
3. Was the money which Ruble paid for the land in question the property of the corporation?
4. If not the money of the corporation, was Ruble acting for the corporation as its agent in buying this land, and so related in his actions in buying the land that he now holds the same in trust for the corporation?

The respondent's claim is that Ruble is its trustee, holding this land for the benefit of the corporation.

To show the affirmative of these several propositions the counsel for the respondent offered in evidence first, a writing which is as follows:

"Know all men by these presents, that we, the undersigned,

subscribers to stock in a certain gravel mine situated on Coyote Creek, in the counties of Jackson and Josephine, in the State of Oregon, agree to pay I. N. Muncy fifty per cent. of the capital value for each and every share set opposite our names, as follows: Twenty-five per cent. in hand and twenty-five per cent. when taken out of the mine over and above expenses. The said mine is to be divided into two hundred thousand (200,000) shares of the par value of one dollar each, in gold coin of the United States. It being understood and agreed that each and every subscriber is to have one half of the net proceeds of the mine *pro rata*, to the whole amount of the capital stock until his stock shall be paid in full in said coin as above mentioned, then he is to receive the amount of stock for which he has subscribed, free from all incumbrance, and full dividends thereafter upon said stock. It being further agreed and understood that the said Muncy is to, at his own expense, extend the ditch known as the McWilliams & Co. ditch down the said creek to a point on the hill above a claim, known as the Robertson claim, and to purchase and place upon said mine another pipe fifteen inches in diameter and of sufficient length for the successful working of said mine, together with a giant and flume corresponding to the same.

Paid Jay Francis.....	\$ 320
Paid by note, Joseph F. Lindsay.....	5,000
Paid by note and horse, James Chenoweth.....	1,000
Paid 25. Jennette Webb	100

It will appear by inspection of the record, as well as by the subsequent testimony, that the name of Win. Ruble, together with the amount of stock, by him subscribed and the words, "as per arrangement," in the margin are all in his own writing.

This paper is not dated, but was signed by Ruble, August 27, and which is the same date as the acknowledgment of the articles of incorporation.

Next after this paper the respondent offered in evidence the articles of incorporation and another writing, which are as follows:

Exhibit 2.—Coyote Gold and Silver Mining Company, incorporated at Salem, Oregon, August 27, 1878, as follows:

Be it known that the following articles of incorporation are

this day entered into by I. N. Muncy, J. L. Murphy, David Stump and Wm. Ruble, for the purpose of mining in gold, silver, and other precious metals; to purchase placer mines of gold, or ledges of gold, silver, or other precious metals; construct or purchase and own water ditches, quartz mills, or any other thing necessary to the successful prosecution of the work of mining.

Article 1. The name of the company or corporation shall be known as the Coyote Gold and Silver Mining Company.

Art. 2. The duration of the company shall be indefinite.

Art. 3. The place of operation of this company shall be in Jackson and Josephine counties, in the State of Oregon.

Art. 4. The principal office of the company or corporation shall be at Leland, Jackson county, Oregon.

Art. 5. The amount of the capital stock of said company or corporation shall be two hundred thousand dollars, which shall be divided into two hundred thousand shares of one dollar each.

The above act of incorporation was executed, in the city of Salem, in Marion county, Oregon, on the twenty-seventh day of August, 1878, signed by I. N. Muncy, J. L. Murphy, David Stump, and Wm. Ruble, incorporators, acknowledged before H. A. Johnson, justice of the peace in and for said county, and filed in the office of the Secretary of State, September 2, 1878.

The incorporators named in the foregoing articles of incorporation agree and bind themselves severally to accept and to cause the directors of said company, when elected and organized, to ratify the contracts and purchases of certain bar and placer gold mines situated on Coyote Creek, in Jackson and Josephine counties, Oregon, made by I. N. Muncy and Wm. Ruble.

And it is further agreed that stock books shall be opened, and the sale of stock of said company be ordered to the amount of two hundred thousand shares (including any shares already subscribed), of the par value of one dollar each, in gold coin of the United States, upon the following terms, to wit, that each share shall be sold for fifty per cent. of its par value, the payment to be made as follows:

Twenty-five per cent. of the par value in cash at the time of

subscribing, and twenty-five per cent. to be taken out of the net proceeds of the mines, it being understood and agreed that each subscriber shall be entitled to receive, as dividends, one half of the net proceeds, according to the number of shares he holds, and that the other one half shall be retained by the company until the sum so retained shall equal his indebtedness for stock.

Thereafter he shall receive certificates of paid-up stock for all the shares he may hold clear of all incumbrance, so far as the company is concerned, and full dividends.

It is further understood and agreed that said incorporators shall, within a reasonable time, extend the ditch known as the Ash & McWilliams ditch down said Coyote Creek to a point on the hill adjacent to a claim known as the Robertson claim, and that they will purchase and place on said mines, in addition to the hydraulic already there, another pipe of fifteen inches in diameter, and of sufficient length for the successful working of the mine, together with a giant and flume corresponding to the same.

It is further agreed that the one half of the net proceeds to be retained by the company, as above specified, shall not remain as assets in the hands of the company, but shall be drawn out by the four incorporators as it accrues in the following ratio, viz: Win. Ruble, one half ($\frac{1}{2}$), I. N. Muncy, three eighths ($\frac{3}{8}$), J. L. Murphy, three fortieths ($\frac{3}{40}$), and D. Stump, one twentieth ($\frac{1}{20}$), said sums to aggregate twenty-five thousand dollars, and no more.

It is further agreed that after the payment of the purchase money of said mining claims, the drawing of the twenty-five thousand by the four incorporators, as above specified, the payment of all costs and expenses of extending the ditch, purchasing and placing in position in working order the pipe, flume and giant, together with implements and tools for working said mines, all sums accruing from the sale of any remaining stock of said company shall be paid to I. N. Muncy, and in consideration of the last named agreement, the said I. N. Muncy binds himself, his heirs and assigns, to put the said company in full possession, with right and title to all mining claims on Coyote Creek, beginning at the lower end of a mining claim formerly owned by Davis & Rathbon

and extending up said creek nearly three miles, including all the mining ground owned on said creek by Davis & Rathbon (*and Marshal*), H. Kelly, O. Jacobs, Robertson, O'Shea, Mathews, and Ash & McWilliams, together with all other rights, mining privileges and appurtenances thereunto belonging, to said company, to have the same in fee simple, yet so as the net proceeds shall inure to the benefit of the stockholders upon the terms and conditions herein specified:

Sept. 14, 1878.

Subscribers' Names.	Amount of Stock.
David Stump.....	5,000 Shares
J. L. Murphy.....	7,500 "
Wm. Ruble.....	50,000 "
J. F. Bewley.....	2,000 "
W. F. Lemon.....	100 "
Z. Davis, per I. N. Muncy.....	2,000 "
E. A. Chase, per I. N. Muncy.....	1,000 "
H. Kelly, per I. N. Muncy.....	1,000 "
T. S. Rodsbaugh, per I. N. Muncy.....	5,000 "
I. N. Muncy.....	50,000 "
G. W. Sloper.....	50 "
John Vernon.....	1,000 "
H. D. Ray.....	2,000 "
R. Doty.....	2,000 "

This last paper, which is attached to the articles of incorporation, is dated on the fourteenth day of September, 1878, and it seems (from a comparison of dates with the records of the corporation) was executed the day that the stockholders met to organize the corporation, and from its terms indicates that it was executed before any organization was made, and was preliminary thereto, and with a view to securing an endowment to Monmouth College of twenty-five thousand dollars. In order that the provisions should in any way become binding on the corporation, it was necessary that the corporation, after it was organized, should accept and approve of these provisions; and whether or not the corporation did so adopt and approve can only be shown by the records of the corporation. For neither the corporation nor others who contemplate taking stock can, before the corporation has been organized by electing directors, dispose of the future earn-

ings of the corporation, nor fix rules to control the action of the directors to be elected.

The statute, p. 525, secs. 5 and 6, provides for and fixes the powers and duties of corporations. Their office is to start the corporation and proceed to perfect its organization as provided for in section 7, and it is only after such organization that it is capable of carrying on the enterprises enumerated in the articles of incorporation. The acts which the incorporations are authorized to do are such as tend to promote the final organization by the election of directors, when the stock becomes liable to be assessed for the purpose of raising funds with which to prosecute its legitimate enterprises. It was not contemplated by the statute that the corporation should be empowered to make assessments and prosecute the business for which the corporation was created.

The stock is not due and liable to assessment until after the organization by the election of directors; and it is provided in section 7 of the act, "that at the organization each stockholder shall be entitled to one vote for such share of capital stock subscribed by him; but after such first election of directors, no person shall vote on any share upon which any installments or portion thereof, is then due or unpaid." Section sixteen, also, provides "that if any such corporation does not elect directors and commence the transaction of the business for which it was formed, within one year from the time of filing articles, etc., it shall be divested of its corporate rights."

The stock is the capital of the corporation on which it is to do business, and it does not become available for that purpose until after directors are elected. All proceedings of the incorporators (who need have no pecuniary interest in the corporation), which are prior to such election, are steps in the organization and are not binding on the corporation except so far as they promote such organization, and the business for which the corporation was formed, as expressed in the articles. And, indeed, the whole spirit of the act indicates that in order to perfect a corporation for prosecuting its enterprises the election of directors is a condition precedent to its perfect organization for business purposes. We think a corporation may hold property necessary for its contemplated enterprises

before its organization is completed, and preserve such property for its future use, and that the corporation exists as a legal entity from the time of the filing of its articles. But the incorporators who represent it prior to a meeting of the stockholders are its agents to perfect its organization and put it in working order, rather than to carry on its business enterprises.

We think that the paper offered in evidence, executed on the twenty-seventh of August, 1878, contains no stipulations or agreements which afterward became binding on the corporation or any of the persons who signed it, for the reason that there is no competent evidence showing that the provisions contained in said agreement were ever adopted or agreed to by the corporation, and that such an agreement by the corporation can only be proved by the records of the corporation, and there is no such record in its proceedings. The same may be said of the other agreement made on the fourteenth of September, 1878. This contained stipulations which could not bind the corporation unless agreed to by the corporation, for it provided for the disposition of the profits of its future business, and it is a self-evident proposition that neither a person nor corporation is bound by a contract which was never agreed to by such person or corporation. We think that Ruble did not become a subscriber by signing these papers above referred to.

We do not, however, decide but what these documents may be competent as tending to show that he authorized his name to be put on the stock books and to explain his subsequent conduct. But suppose Ruble was a subscriber, when did he become such? Certainly not until he authorized his name to be subscribed to the capital stock, by his direct act or conduct as a subscriber, and he did not act in that capacity until the organization on the fourteenth of September. What he did prior to that time for the corporation was as a corporator or agent of the corporation.

If he was a subscriber, when did he become liable to pay his subscription? We think that liability did not accrue under the corporation until after the directors were elected and an order made for a call for the stock, unless by the terms of the subscription the payment is to be made without a call.

So this subscription could not in any event have been demanded before the fourteenth of September. Prior to that time the corporation had no secretary or treasurer, or capacity to demand subscriptions. So if this position be true, Ruble, at the time he purchased these claims was not owing the corporation the money he paid for the property, and it was his unless he voluntarily parted with it to the corporators, of which there is no evidence (except that the money was carried to the depot in the canteens of Muncy, which Ruble had borrowed), and he then had the legal right to invest the money on his own account, for it was still his money though he may then have been instructed to pay it on his future subscription to the corporation, and if he did go to the mines to buy these claims for the corporation with his own money, and afterward changed his mind, either from a good or bad motive, and took the deeds in his own name, there would be no such resulting trust to the corporation as could be enforced against him until the purchase money was refunded to him or he be placed in such a relation to the corporation as would be equivalent to a tender of the purchase money which he had paid. It is claimed that he owed the corporation this amount at the commencement of this suit. To put him in such a position he must be a subscriber to the stock of fifty thousand dollars. The records of the corporation must show that this amount is due and owing. To show this, it must be shown by the records of the corporation:

1. By the stock book signed by Ruble or evidence equivalent to such signing.
2. That one half of the capital stock of the corporation has been subscribed.
3. That an assessment has been made on all of such stock for cash for ninety-five per cent. of such stock.

None of these things appear from the records of the corporation, except that one half of the capital stock appears in a list on the stock book to be subscribed. But all the names of the subscribers appear to be placed in this list by the secretary, William Ruble, except his own name, which is in the handwriting of W. F. Briggs, and without the consent of Ruble, who refused to sign the same, and this list was so made by the secretary after this suit was commenced.

The undertaking to which their names are subscribed is as follows: "We, the undersigned, subscribers to the capital stock of the Coyote Gold and Silver Mining Company do hereby bind ourselves to take the number of shares that we subscribe for, and to pay therefor in United States gold coin, as per conditions entered into by the incorporators and others, in the town of Monmouth, Polk county, Oregon, September 14, 1878, and recorded in the journal of said company on pages 5, 6, and 7." "Names of original subscribers." Then follows the list of subscribers in the manner following:

Subscribers' Names.	Amount of Stock.	Amount paid.	When paid.
P. O. address.			

David Stnmp,	5,000	\$2,500	Jan. 17, 1879.
Monmouth, Polk Co.			

And other subscribers in like manner.

These conditions referred to in the undertaking are contained in exhibit number two, above set out in this opinion. One of these conditions is, "that the incorporators agree and bind themselves severally, to accept, and to cause the directors of said company, when elected and organized, to ratify the contracts of and purchases of certain bar and placer gold mines, situate on Coyote creek, in Jackson and Josephine counties, Oregon, made by I. N. Muncy and William Ruble." Another condition is, "that said incorporators shall, within a reasonable time, extend the ditch known as the Ash & McWilliams' ditch down said Coyote creek, to a point on the hill adjacent to a claim known as the Robertson claim, and that they will purchase and place on said mines, in addition to the hydraulic already there, another pipe of fifteen inches in diameter, and of sufficient length for the successful working of the mine, together with a giant and flume corresponding with the same." This agreement was intended to limit and regulate the action of the corporation then to be organized, and which was organized on the same day this agreement was executed; and in order to make the subscribers liable for stock, it was incumbent on the corporation, when organized, to perform and carry out the conditions of the contract which the subscribers had signed, and which was the foundation of their liability. They should have notified the contractors and purchasers of I. N. Muncy and Ruble, or attempted to do so,

by some resolution or proceeding of record; and also the incorporators should have extended the ditch and placed the pipe and a giant in the mine as agreed. And it should appear from the records of the corporation, that it had performed on its part, before it could compel individual stockholders to perform by paying subscriptions. The directors of this corporation show, by their record, no compliance or attempt to carry out these fundamental conditions above named. Nor is there anything said or done in said records as to any effort being made by the corporation to have I. N. Muncy put the company in the possession of the mining claim named in the last part of said agreement. Nor does said Muncy comply or attempt to comply with his part of said agreement.

It is evident from this agreement that the opening of stock books and the ordering of the sale of stock were proceedings to be had after the corporation was organized, and such orders should appear in the records of the corporation.

The corporation had no authority to make this order to reduce the stock to half price, for the statute limits their powers, section 4, page 525, when it says the articles shall specify "the amount of the capital stock," and "the amount of such shares of stock."

This must be the true, not the fictitious amount.

Thus section 6 provides that it shall be lawful to organize when one half of such stock is subscribed, so that the incorporators could not order that the stock should be paid in full on the payment of one half. And it appears from the records of the corporation which are before us in evidence, that as yet no such proceedings have been had by this corporation as will enable them to enforce the payment of this stock against individual stockholders. And consequently the corporation shows no indebtedness due from Ruble to them, which is an equivalent of a tender to him of the money he had paid for this land.

It is claimed by the respondent that Ruble is estopped from disputing that he was a subscriber of fifty thousand dollars of the capital stock of this corporation, by his acting as secretary, and acting and voting as a subscriber, and serving as a director. The evidence shows that at the meeting of those who claimed to be stockholders and who elected the directors,

each individual voted one vote without reference to the number of shares held by him, and that at that time no subscription had been made to the capital stock which would bind any subscriber to pay, unless he became so bound by having voted at the meeting, or acted as an officer. The list of stockholders whose names appear on the stock book, appear to have been placed there after this organization by the secretary, and would not be the subscriptions of these individuals unless authorized or assented to by them. These preliminary papers were not subscriptions, and did not authorize the secretary to subscribe the stock book for the persons who had subscribed these papers (*Granger, Market Co. v. Vinson*, 6 Or. 172) If any of these persons whose names are on this stock book were sold for a call on the stock, he could answer that he had not subscribed; or, if he had subscribed, could set up any condition precedent to payment, to be performed by the corporation, and which had not been performed. As in this case, the conditions in the agreement of September 14th to be performed by the corporators, had been violated, for as between the corporation and its stockholders, the conditions of a subscription may be inquired into, for both parties are chargeable with notice of these conditions, and there is no estoppel. Any actions or declarations of Ruble, made after the elections of directors, that he was a subscriber, are evidence to show that his name was placed on the stock book with his assent, and if, in this case, one half of the capital stock of this corporation had been actually subscribed, and the corporation duly organized by the election of directors, as pointed out by statute, and Ruble had accepted the position of director, supposing that his subscription to these preliminary papers amounted to a subscription, he might be held as a subscriber; and if sued for one assessment, could only make as a defense that the same was not due by the conditions of the subscription. But in this case, as has already been said, this corporation proceeded to organize before the stock was subscribed, and as the proceedings were fatally defective, any member might repudiate it as between his fellows, unless afterward he subscribed the stock, or so far proceeded with his fellows in the business as to cure this defect, and there is no legal evidence that any new obligations were assumed.

There is a large amount of testimony tending to show that Ruble was active in getting up this corporation, and inducing others to take an interest in it. But all these parties were bound to take notice of the condition of the corporation, for each had access to its original subscription, if any there was, the same as Ruble, and as all subscriptions must be in writing, all stockholders stand equal before the law.

When this corporation claims that Ruble owes it twelve thousand five hundred dollars as one fourth of his capital stock to the corporation by him subscribed, and he denies the subscription, it is necessary for the corporation to prove the subscription by producing the subscription signed by Ruble, either by himself or by another for him with his authority, or by some acts of his which are equivalent to a subscription. And as has been already stated, we do not think these acts show that he was a subscriber, or that the proof shows that the other persons whose names are put down as subscribers in the stock book have subscribed in such a manner as would make them liable to an assessment for unpaid stock. (See 6 Or. 172.) But we think the evidence does show that Ruble purchased the property in question, intending at the time that it should be for the use of the company, and that he took the title in his own name to secure himself for the money he paid, and that he continued to hold it with such intent until after the meeting at Monmouth on the fourteenth of September, 1878. For on that day, in the agreement of that date already set out, the incorporators, of whom Ruble was one, agreed to bind themselves severally to accept, and cause the directors of the corporation, when elected and organized, to ratify the contracts and purchases of certain bar and placer gold mines, situate on Coyote Creek, in Jackson and Josephine counties, made by I. N. Muncy and Wm. Ruble. And the evidence establishes the fact that the mines referred to in this agreement as purchased by Ruble are the property in controversy. And as Ruble signed this agreement, we think he plainly signifies in it his intention to transfer this property to the corporation, as the evidence shows that it was the object of all the parties (including Ruble) to secure all these claims and the water to work them, because they would be much more valuable if owned and worked together than if

owned severally. If, for any reason, Ruble saw fit to withdraw from the corporation and not subscribe to the capital stock, he should, on being paid the money he expended in securing these claims, transfer the same to the corporation, and it is not equitable in him to hold a part of those claims to the manifest injury of those who joined with him in trying to secure what they evidently thought a valuable mine when consolidated in one ownership.

But we do not think this court can make a corporation for the plaintiff from the evidence, with Ruble as member and stockholder, and declare him indebted to the corporation the sum of money he paid for this land. And if the corporation desires this property, and it is of the great value claimed by the plaintiff, no injustice would accrue to the plaintiff if Ruble should retire from this mining enterprise, and on the payment to him of his money be required to transfer the property to the corporation; and the plaintiff can have no pecuniary interest in holding Ruble as a member of the corporation, unless the land is worth less than he paid for it, or if it be desirable for the plaintiff to return the money paid by Ruble as working capital, and as he purchased these mining claims with his own money, but under such representations to the incorporators as would make it inequitable for him to hold the same against the corporation (provided the corporation tenders him the purchase money), because this land is so situated as to render valueless the other claims about which all these corporators were negotiating, and to work which the corporation was formed, it will be necessary for the corporation to first tender Ruble his money, or put him in a position of indebtedness to the company, which is equivalent to a tender, which has not been done: *Perry on Trusts*, sec. 129.

We think, therefore, that the plaintiffs have not proven the essential facts to maintain their complaint, and that the decree of the circuit court should be reversed and the plaintiff's bill dismissed.

Mr. Justice PRIM dissenting.

Being unable to agree with the opinion of the majority of the court in this case, I feel compelled to dissent.

Under the facts as developed by the evidence in this case

I hold that it was the duty of Ruble: 1. To have filed the third articles of incorporation in Jackson county, and 2. To have bought the mining ground in dispute for and in the name of the corporation then being formed for that special purpose; not, as is claimed by him, with money of his own, which was to be returned to him, but with money which he, and others engaged in the enterprise, had agreed to advance for that purpose, and in consideration of which Ruble was to own and to have issued to him fifty thousand shares of the stock of the corporation, when the same was in a condition to make such issue.

But it is sought, on behalf of Ruble, to repudiate and avoid his agreement with the subscribers to the preliminary agreement and with his co-corporators, on the ground that the corporation was not in existence at the time when the agreements were made and at the time the conveyances were taken, as at that time the third articles of incorporation were in the possession of Ruble, and not on the files in Jackson county, where, under his agreement, they should have been. This position appears extremely technical, and, in my judgment, should not be allowed to prevail. Ruble, being at the time a special agent and trustee for the purpose of filing these papers and securing these mines to the corporation plaintiff, ought not to be allowed, even in a court of law, much less in a court of equity, to take advantage of his own wrong and want of good faith, since equity always treats "that as done which of right and justice should have been done."

It is further claimed that Ruble was exonerated from compliance with his agreement on account of irregularity in the organization of the plaintiff corporation, as well as informality in its subsequent proceedings. In answer to this position, it may be suggested that it could have made no difference whatever with Ruble as to what was to have been done after he had complied with his agreement, inasmuch as he did not comply with it, whether the subsequent proceedings were regular or not.

Thus it will be seen that subsequent informality could not exonerate him. And it will be further noticed, by closely observing the facts, that nothing would have gone wrong in the entire enterprise, except for Ruble's own dereliction and

want of good faith. In the view which I have taken of this case, I regard it as immaterial whether Ruble, technically and in the strict sense of the term, became a stockholder in the plaintiff or not. There can be no doubt but that the preliminary subscription, gotten up by Muncy, related to the property in question, and that the plaintiff was incorporated for the purpose of absorbing this very preliminary association. It was understood between Ruble and his associates, after subscribing the Muncy papers, that he was to own one fourth of these mines, and that the others were to own interests therein in proportion to the amount subscribed. After signing the Muncy papers, Ruble took a lively interest in the enterprise, and assumed nearly the entire management thereof, suggesting the propriety of incorporating immediately, preparing the articles of incorporation, and causing them to be executed, acknowledged, and filed, as required by the statute in such cases.

In the organization of the incorporation the Muncy subscription was adopted as its subscription of stock, as is conclusively shown by the construction placed upon it by all parties concerned in the enterprise. All the subscribers, including Ruble, recognized and treated it as such. Ruble notified them, as subscribers of stock, to appear at Monmouth, on September 14, 1878, for the purpose of organizing the corporation, by electing directors and other officers. All of the subscribers, in obedience to this notice, did appear either in person or by proxy, and the organization of the plaintiff, then and there accomplished, was based upon this subscription and none other. Ruble claimed to own fifty thousand shares in the stock by virtue of said subscription and the right to vote the same.

As a matter of fact he was elected one of the directors of the corporation by virtue of this subscription, and he was also elected secretary of the corporation. Both of these offices he then and there accepted, and entered upon the discharge of their duties. As such secretary he transferred the preliminary subscription to the regular stock book of the company, with the exception of his own subscription, which he failed and refused, for some cause, to transfer. He also issued certificates of stock to all the subscribers except him-

self. Having thus taken the lead and principal management of this enterprise upon himself, he has succeeded in securing the title to the property in dispute in his own name; which virtually gives him control of the other mines not conveyed to him, as he has succeeded in securing those which control the water rights.

I claim that, under the facts in this case, Ruble is estopped in equity from denying that he is a stockholder in the plaintiff: Thompson on Liability of Stockholders, secs. 105, 124, 162, 165, 166; 5 Otto, 667; *Dong v. Naper*, Supreme Court of Ill., 8 Reporter, 522.

And while I concede that in equity Ruble may have been entitled to a lien upon the property in dispute, to secure him in whatever amount he may have advanced or paid on the property in excess of his proportion, and that while the court might and should have secured said lien by a proper decree, I am unable to assent to the proposition that he may "change his mind, either through good or bad motives," and wholly retire from the enterprise and hold the property in his sole right, unless his associates shall refund to him the whole amount advanced by him to pay for said property.

In my opinion the bill ought to be retained and the decree of the circuit court modified in accordance with the views herein expressed.

STEWART ET AL. V. MAHONEY MINING CO. ET AL.

(54 California, 149. Supreme Court, 1880.)

Bona fide stockholder—Void election. At a meeting of stockholders for the election of trustees, 1,000 shares were represented by a person to whom the stock had been issued as trustee, without the consent or knowledge of the owners. Without him a majority of the stock was not represented at the meeting. *Held*, that he was not a *bona fide* stockholder within the meaning of § 312, Code of Civil Procedure, and that the election was void.

Special proceedings. Under § 76, Code of Civil Procedure, courts are always open to hear special proceedings of a civil nature.

Appeal from a judgment annulling an election of directors of a corporation, in the Nineteenth District Court, City and County of San Francisco.

WHEELER, J.

This was a proceeding under § 315, Code of Civil Procedure, to annul an election of directors of the corporation defendant. The other facts are stated in the opinion.

G. F. & W. H. SHARP, for appellants.

At the time of the election, Bush had the legal title to the stock, and the stockholders were bound to recognize his right to represent and vote said stock at the election: *Weaver v. Bardon*, 49 N. Y. 290.

MCALLISTER & BERGIN, for respondents.

In order to vote at such election the stockholder must be *bona fide*: Code Civ. Proc. § 312; *Calaveras Co. v. Brockway*, 30 Cal. 338.

Department No 2, MYRICK, J.

The question involved in this case is as to the validity of an election of trustees of the defendant, the Mahoney Mining Company, a corporation. The stock of the corporation is divided into 12,000 shares, of which 6,140 were voted at the

meeting held May 1, 1877. Of these 6,140 shares, 1,000 stood in the name of "H. P. Bush, trustee," and were voted by him. Bush had no interest in the 1,000 shares, nor was he the owner of any of the stock of the corporation. The 1,000 shares were owned as follows: Bell, 400 shares; Sharon, 400; Flood & O'Brien, 200; neither of whom authorized Bush to represent them, or, in fact, knew of the meeting. The stock had been issued in the name of Bush, trustee, by the secretary, without authority, and without the knowledge of the owners, for reasons not appearing in the record. On the trial, the secretary when asked what authority he had for issuing the stock to Bush, replied: "There was no authority necessary at all. If you knew the rules of business you would not ask the question. Mr. Bush was my private secretary, and all stocks of those that we call manipulators are never issued in their names; they generally have it issued to a man in the office, and for that reason all such stocks were issued in the name of Hyman P. Bush."

Section 312, Code of Civil Procedure, requires that every person voting at a meeting, in person or by proxy, or by representative, must be a member thereof, or a *bona fide* stockholder, having stock in his own name on the stock books.

Bush was not the proxy or representative of either of the owners of the stock, nor was he a member of the corporation, nor was he a *bona fide* stockholder; therefore, he had no legal right to vote the stock. Without the stock assumed to be represented by him, but 5,140 shares were represented at the meeting, and the proceedings were not in compliance with the statute.

An objection is made by the appellant that the court below had no jurisdiction to hear the case, because the order to show cause was made returnable June 15, 1877, during vacation, the court having adjourned May 2, 1877, until July 9, 1877. Section 76, Code of Civil Procedure, is a complete answer to the objection. By that section the court was always open to hear special proceedings of a civil nature, of which this is one.

The judgment of the court below is affirmed.

THORNTON, P. J., and SHARPSTEIN, J., concurred.

BASSETT V. THE MONTE CHRISTO G. & S. M. Co. OF
NEVADA ET AL.

(15 Nevada, 293. Supreme Court, 1880.)

Power of directors beyond limits of State. The directors of a corporation, unless forbidden by its charter, or the general laws of the State from which it derives its existence, may perform all except strictly corporate acts outside of the limits of such State, as well as within them. The directors of a Pennsylvania corporation at a meeting in the city of New York may authorize the president and secretary to make a trust deed and issue bonds.

Duplicate deed of trust—Ratification unnecessary. A deed of trust having been executed by authority of the directors of a corporation, and lost in transmission, a duplicate was executed. *Held*, that the duplicate was valid, and no ratification necessary.

Trust deed by corporation with director as trustee. In a suit against a corporation to foreclose a trust deed, the stockholders can not object to the validity of the deed, because the trustee therein named is also a director in the corporation.

Statute of limitations—Record of trust deed—Third parties. A suit to foreclose a trust deed was begun more than four years (the period of limitation) after the date of the deed but less than four years after the maturity of the bonds which it was given to secure. *Held*, that the action was not barred by the statute, and that the record of the deed secured the mortgagee against a subsequent incumbrancer to the same extent as against the mortgagor.

Practice. An objection not made in the court below will not be considered.

Bonds issued to directors—Stranger can not complain. Bonds regular upon their face, issued by a corporation, but really for the benefit of the directors who authorized their issuance, are not void, but only voidable at the election of the corporation or its stockholders, and if they do not complain, a stranger, a subsequent creditor, can not.

Appeal from the District Court of White Pine County,
Sixth Judicial District.

This was an action by Robert N. Bassett to foreclose a trust deed given by The Monte Christo Gold and Silver Mining Company of Nevada to secure bonds issued by the company. J. E. Marchand being a judgment creditor of the corporation, was made a party defendant. The company suffered a default, and both Bassett and Marchand appealed from the decree entered by the court below.

HILLHOUSE & DAVENPORT, for Bassett.

D. E. BAILY, for Marchand.

By the court, BEATTY, C. J.

It appears, from the statement and record of this case, that the defendant, The Monte Christo Gold and Silver Mining Company, of Nevada, is a corporation chartered by special act of the legislature of Pennsylvania and authorized thereby to hold meetings and transact business at any place in the United States; that in February, 1869, the management of its affairs was vested in a board of thirteen directors, seven of whom met in the city of New York on the third of that month and passed a resolution authorizing the issuance of bonds of the company not exceeding fifty thousand dollars in amount and the conveyance of its real property, situated in White Pine county, in this State, in trust to secure the payment of the same.

In pursuance of this resolution said property was conveyed to plaintiff as trustee and bonds issued and disposed of. The first deed of trust having been lost in course of transmission to this State, a duplicate was executed June 29, 1869, and duly recorded in White Pine county. In the interval between the execution of these two deeds, a meeting of the stockholders of the company was held at its office, in the city of New York, at which a resolution was adopted, reducing the number of its directors from thirteen to five. At a subsequent meeting of four directors of the company at New Haven, Connecticut, the action of the president and secretary, in executing the duplicate deed of trust, was reported and ratified.

The object for which the bonds of the company were issued was to take up its floating indebtedness, much the larger portion of which was due to the plaintiff and three other persons who were, at the time of the transaction, directors of the company, and constituted a majority of the members present at the meeting in February, when the bonds and mortgage were authorized, and at the subsequent meeting, at which the action of the president and secretary was ratified. Out of the fifty thousand dollars of bonds

issued and made payable to the plaintiff or bearer, nearly four fifths were retained by him and his fellow-directors in satisfaction of their claims against the company, and the balance (ten thousand two hundred dollars) delivered to its other creditors.

None of said bonds having been paid, this action of foreclosure was instituted by the plaintiff as trustee in behalf of the bondholders.

The defendant, Marchand, holds a judgment lien on the mortgaged premises, subsequent in point of time to the record of the trust deed; but he claims priority thereto on the grounds that it was unauthorized, fraudulent, and without consideration, and that this action is barred by the statute of limitations.

The corporation defendant makes default.

The conclusion of the District Court upon the facts stated was, that the mortgage was valid as a security for the bonds issued to the outside creditors of the company, but void as to the plaintiff and his fellow-directors, by whose votes it was authorized.

The decree is for a sale of so much of the mortgaged premises as may be necessary, and the application of the proceeds to the payment. 1. Of costs, etc. 2. Of the claims of said outside bondholders. 3. Of the claims of the defendant, Marchand.

From this judgment the plaintiff and Marchand both appeal.

The first point urged in support of Marchand's appeal is, that the president and secretary of the company could derive no authority to make the trust deed and issue bonds from the resolution of the meeting of the directors held in the city of New York, and outside of the territorial limits of the State of Pennsylvania, where alone the corporation had a legal existence.

We think, however, that without regard to the fact found by the District Court, that this corporation was empowered by its charter to meet and act at any place in the United States, the resolution in question was not invalid by reason of the place of the meeting at which it was adopted.

It seems to be settled by the weight of authority, and es-

pecially by the more recent decisions in the courts of the United States, that the directors of a corporation, unless forbidden by its charter, or the general laws of the State from which it derives its existence, may perform all except strictly corporate acts outside of the limits of such State, as within them; and it is not pretended that the conferring of power to issue bonds and mortgage the real property of a corporation is a corporate act in the strict sense of that expression. (See a full discussion of this question and authorities cited in c. 4. appendix, Green's Brice's Ultra Vires, 676, *et seq.*)

There is no proof and no presumption that the laws of Pennsylvania forbid directors of its corporations from meeting and acting outside of the State; and the charter of this corporation, which is itself a statute of Pennsylvania, so far from forbidding such meetings, expressly authorizes them.

As to the right of the stockholders to meet in New York, and reduce the number of directors, we are not called upon to express an opinion. That question cuts no figure in the case, unless we should hold that the vote of ratification, passed by four directors at the meeting in New Haven, was essential to the validity of the duplicate deed of trust executed by the president and secretary, on hearing of the loss of the original. But we do not consider that any ratification was necessary; the execution of the duplicate deed was fully authorized by the original resolution of the February meeting in New York.

Counsel for Marchand, it is true, makes the additional point that the vote of ratification was essential; for the reason that some of the bonds were disposed of at a heavier discount than was warranted by the resolution of the seven directors at the February meeting.

If there was anything in the statement to sustain this allegation, we can not see how the fact, that a portion of the bonds were negotiated at too low a rate, could affect the validity of the trust deed or of the other bonds. The deed was executed in the first place, and on the faith of that security, several creditors of the company accepted its bonds in satisfaction of their respective claims. If some of the

creditors received more bonds than they were entitled to, certainly that circumstance should not be held to invalidate the bonds issued to the others, or to impair their security. At the very most, it would be a ground of defense as to that portion of the bonds improperly issued. But in this case there is nothing to call for the slightest modification of the decree on that ground. It does not in any way appear that any of the claims, which are allowed priority to Marchand's judgment, are founded upon bonds improperly issued. The findings of the court, indeed, are to the effect that all the bonds were issued in pursuance of the authority conferred on the president and secretary, and as there was no motion for a new trial, nor other objection to the findings of the District Court, the testimony in opposition thereto can not be considered.

For the purposes of this appeal it must be assumed, in accordance with the findings, that all the bonds were issued in pursuance of the original resolution of the board.

The next objection to the validity of the trust deed is founded on the fact that Bassett—the trustee to whom the legal title was conveyed—was himself one of the directors of the corporation. It is contended that his position as trustee for the stockholders disqualified him from accepting the position of trustee for the creditors of the corporation.

No case in point is cited in support of this proposition, and the general principle relied on—that no man can serve two masters at the same time—does not seem to be applicable. The trustee under a deed of this character is always agent for both debtor and creditor; but even where he is invested with full power to dispose of the property and apply the proceeds in payment of the debt, it is not considered that his duty to one is inconsistent with his duty to the other.

Under this deed, Bassett had no power, except to hold the legal title to the property as security for those who should accept the bonds of the company. That he had interests identical with the corporation, made him none the less trustworthy an agent for it and its stockholders, and if the creditors of the company were willing to accept the security offered, with Bassett as trustee, it certainly does not lie in the mouth of the

corporation, or those claiming under it, to assert his incapacity against those who were willing to trust him, notwithstanding his interests were to some extent opposed to their own.

The point that the deed was without consideration is not presented on this appeal, and it is not contended that there was any actual fraud on the part of the directors who ordered it made. The only remaining ground upon which its validity is impeached, is that upon which the District Court proceeded in holding that there could be no recovery on the bonds issued to the directors of the company who participated in the meeting at which they were authorized. This point will be discussed when we come to consider the plaintiff's appeal.

It is next contended, in behalf of Marchand, that this action was barred by the statute of limitations. It was commenced more than four years after the date of the mortgage or trust deed, but less than four years after the bond secured thereby came due. It is admitted that the right to sue on the bonds was not barred, but it is claimed by Marchand that the mortgage can not bind the estate against his judgment lien during any longer period than the notice imparted by the record of the trust deed showed it would be bound. The deed was dated June 29, 1869, and was in form an absolute conveyance to Bassett, subject to the following conditions:

"The condition of this deed is such, that if the party of the first part shall well and truly pay their bonds that are or may be issued, to an amount not exceeding fifty thousand dollars in the whole, dated March 1, 1869, and payable to the said Robert N. Bassett, trustee, or bearer, together with the semi-annual interest thereon, at the rate of seven per cent. per annum, according to the tenor of the coupons attached to said bonds, then these presents to be void," etc.

Marchand, it is said, had no notice of the tenor of the bonds except this reference to them in the trust deed. It is claimed he had a right to presume they were due at the time the trust deed was executed, and that the statute began to run on the day it was dated, and consequently, that as to him, it did begin to run on that day.

We have not been referred to any decided case, and we are not aware of any in which the statute of limitations or the

registration laws have been construed in accordance with these views. By the former an action is only barred by the lapse after the cause of action has accrued, and it is admitted that in this case such period had not elapsed before the action was commenced. Record or actual notice is essential to the validity of a mortgage as against subsequent incumbrancers, but when a mortgage is duly recorded it secures the mortgagee against third persons to the same extent that he is secured against the mortgagor.

It has been frequently decided in California (see *Wood v. Goodfellow*, and cases cited, 43 Cal. 185), that as against subsequent incumbrancers the mortgagor can not extend the time of payment, or otherwise increase the burdens on the mortgaged premises, and the correctness of those decisions is not questioned. They are not, however, applicable to this case. No attempt was made by the Monte Christo Company, or its agents, to increase the burdens upon their estate after the lien of Marchand accrued. He knew when he became a creditor that the estate was charged with the payment of fifty thousand dollars of bonds, with semi-annual interest coupons attached. This, we think, was sufficient notice to him, if any such notice was needed, that the bonds were not then due, and sufficient to put him upon inquiry as to when they would become due, if his action was at all contingent upon the state of the case in that particular.

The last point made in behalf of Marchand is, that the trust deed was void for want of the requisite stamp.

This objection, so far as appears from the statement and assignment of errors, is taken for the first time in this court. It can not, therefore, be considered.

Upon the whole, we are of the opinion that the District Court committed no error of which the appellant Marchand can complain. The appeal of the plaintiff Bassett involves but one question. Did the District Court err in deciding that he could not recover on the bonds issued to himself and his fellow-directors?

We think this conclusion was erroneous. It is true that a majority of the directors who authorized the issuance of the bonds, and the execution of the trust deed, were to be directly benefited thereby; but this does not appear from the face of

the bonds or the deed, and there is no ground, therefore, for holding them void *ab initio*. On their face they are regular and *prima facie* valid. That they were voidable at the election of the corporation, or its stockholders, would seem to be clear; but neither the corporation nor the stockholders have complained, and a stranger, like Marchand, can not. There may be authority for holding, that a deed which purports to have been executed by the grantee as agent for the grantor, is absolutely void as to all the world; but where, as in this case, bonds are issued and a mortgage given to a third party, though for the benefit of the agent or trustee, they are not void, but merely voidable at the election of the *cestui que trust*. If he repudiates the transaction within a reasonable time, it will be set aside by a court of equity, upon the ground that he has been defrauded, and this, as a matter of course, without inquiring whether he has been actually injured or not. But if he chooses to acquiesce in the transaction, a third party, who can not pretend to have been injured thereby, will not be heard to complain of it. (See authorities cited in notes to secs. 210, 211; Story on Agency, 8th ed.)

The cases cited by counsel for Marchand (49 Cal. 290; 44 Id. 112) are not in conflict with this view. In both instances it was the *cestui que trust* who raised the objection of fraud, and whatever expressions occur in the opinions in those cases must be understood as having been used with reference to that fact.

Our conclusion is, that the decree of the District Court should be so modified as to order the sale of so much of the mortgaged premises as may be necessary, and the application of the proceeds, after the payment of the costs and expenses of the litigation and sale, first, to the payment of the whole fifty thousand dollars of bonds and interest due to the bondholders of the company; and, second, to the payment of the claim of Marchand. It is therefore ordered that the District Court modify its decree accordingly.

Decree modified.

ROUSSEAU V. HALL ET AL.

REYNOLDS V. HALL ET AL.

BOLEN V. THE SAN GORGONIO FLUMING CO.

(55 California, 164. Supreme Court, 1880.)

Party to action—Day in court—New trial. In an action to foreclose a mechanic's lien against Hall and others, composing the firm of the San Gorgonio Fluming Co., a corporation of the same name, appeared answered and judgment was rendered against it. *Held*, that the corporation had never been made a party to the action, and had not had its day in court, and that a motion for new trial was erroneously denied.

Appeal from a judgment for the plaintiff, and from an order refusing a new trial, in the District Court of San Bernardino, Eighteenth Judicial District.

Actions against Hall and others, composing the firm of the San Gorgonio Fluming Co., to foreclose a mechanic's lien on a flume. The defendants commenced the construction of the flume October 18, 1876, and the plaintiffs performed labor thereon from October 19, 1876, to July, 1877. On the 13th day of February, 1877, the San Gorgonio Fluming Co. was incorporated. The corporation answered, and judgment was rendered against it. The appeal was taken by the corporation.

J. D. BOYER and BICKNELL & WHITE, for appellants.

TALBOTT & HARRIS, for respondents.

By the COURT.

The decree and order denying the motion for a new trial reversed, so far as concerns the San Gorgonio Fluming Company, a corporation. The findings and decree seem to be based upon the fact that the company is a corporation, and as such is indebted to the plaintiffs, and its property is decreed to be sold. The corporation has never been made a party to the action, and has not had a day in court.

Judgment reversed.

1. The assumption of a corporate name (The Anglo-American Gold Mining Association) and issue of transferable stock is not a nuisance or public grievance at common law: *Harrison v. Heathorn*, 6 Scott N. R. 735. Nor does it deprive the associates of remedies against each other: *Sheppard v. Ozenford*, 1 Kay & J. 491; *Post RECEIVER*.

2. Grant to association not having legal existence: *Vermont Co. v. Windham Bank*, 44 Vt. 489; 3 M. R. 312.

3. Organization upon fictitious capital—consideration of mines paid *pro forma* by checks not drawn on value: *Bradley v. Poole*, 98 Mass. 169; *Post FRAUD*.

4. Subsequent legislative recognition cures defects in organization: *Kanawha Co. v. Kanawha Co.*, 7 Blatchf. 391.

5. False recitals in the preamble of a legislative charter are no ground of action, by means of which to make the stockholders liable to the creditors: *Matthewes v. Stanford*, 17 Ga. 543.

6. A single corporation may be formed for "the mining of gold, silver and lead." It is not three kinds of business: *People ex rel. v. Beach*, 57 How. Pr. 337.

7. Power to make an irrevocable agency: *Davis v. Flagstaff Co.*, 2 M. R. 660.

8. Corporate power limited by charter: *Id.*

9. The secretary is the proper custodian of the corporate seal: *Evans v. Lee*, 11 Nev. 194.

10. Corporation may alter seal at pleasure; may adopt a private seal: *Richardson v. Scott Co.*, 22 Cal. 150.

11. Status of title held by incorporators under contract to convey to the company: *San Felipe Co. v. Belshaw*, 49 Cal. 655; *Post EJECTMENT*.

12. Disabilities of foreign corporations in Pennsylvania: *Green v. Ashland Co.*, 62 Pa. St. 97; *Post REPLEVIN*; *Runyan v. Coster*, 14 Peters, 122.

13. Foreign corporation may lawfully mine in Ohio: *Newburg Co. v. Weare*, 27 Oh. St. 343; *Hanna v. International Co.*, 23 Id. 622.

14. A foreign corporation is precluded from disputing the sufficiency of the certificates, etc., required by local law to be filed: *Id.*

15. Foreign corporation can not plead statute of limitations in Nevada: *Barstow v. Union Co.*, 10 Nev. 386; *Robinson v. Imperial Co.*, 5 Id. 44; *Post MILL SITE*.

16. A court of New York will not entertain suit between two corporations, both foreign, to set aside deed recorded in another State: *Cumberland Co. v. Hoffman Co.*, 30 Barb. 159.

17. New York corporation quarrying in New Jersey not recognized, and the associates composing it treated as partners: *Hill v. Beach*, 12 N. J. Eq. 31.

18. Proof of president's authority to contract for the company: *Steel v. Solid S. Co.*, 3 M. R. 155; *Sharer v. Bear R. Co.*, 2 M. R. 537.

19. Corporation may repudiate contract in which directors have a secret interest: *Wardell v. U. P. Co.*, 4 Dill. 330; *Post FRAUD*.

20. Contract between mining company and national bank; ratification by failure to disavow acts of agent: *Union Co. v. Bank*, 1 M. R. 432.

21. A mining corporation has the power to purchase and use a steamboat to transport its coal: *Callaway Co. v. Clark*, 32 Mo. 305.

22. Contracts and purchases *ultra vires* of a mining corporation. The vendee must know of the unlawful purpose: *Miners Co. v. Zellerbach*, 37 Cal. 543. Purchase of proper subject-matter not vitiated by improper subject-matter forming parcel of the contract: *Moss v. Averell*, 10 N. Y. 449; *Moss v. Rossie Co.*, 1 M. R. 289, and *note* p. 295.

23. Proof that a party was officer *de facto* of a corporation is sufficient on prosecution for illegal issue of notes: *McGurgell v. Hazleton Co.*, 4 W. & S. 424.

24. The Act of 1850, restraining corporations from issuing bills, notes, etc., or other evidence of indebtedness construed not to extend to paper issued as the ordinary evidence of a loan: *Magee v. Mokelumne Co.*, 5 Cal. 258.

25. A director's acceptance of his office is presumed: *Nimmons v. Tappan*, 2 Sw. (N. Y.) 652.

26. *Non user* does not *ipso facto* dissolve a corporation: *Id.*

27. The corporation is not a proper party to contracts between its stockholders concerning its business and stock: *Peru Co. v. Merrick*, 79 Ill. 113; see *Merrick v. Peru Co.*, 3 M. R. 583.

28. Parties to suits involving the rights of the company and stockholders and the duties of the corporate officers: *Burke v. Flood*, 1 Col. L. R. 71; *Post EQUITY*.

29. A corporation is liable for the acts of its agents though the corporate name be not disclosed, unless credit was given to the agent exclusively: *Conro v. Port Henry Co.*, 12 Barb. 27.

30. A party can not sue a corporation for conversion of his shares, and at same time in another suit claim rights as a stockholder: *Hughes v. Vermont Co.*, 72 N. Y. 207.

31. Organizers pretending to sell to stockholders at first cost of property: *Simons v. Vulcan Co.*, 61 Pa. St. 202; *Post FRAUD*.

32. Organization of new company by part of stockholders of an older company, with intent to exclude other stockholders: *Titus v. Minnesota Co.*, 8 Mich. 184.

33. A co-purchaser with a director of a corporation is affected by all the legal disabilities of such director: *Hoffman Co. v. Cumberland Co.*, 16 Md. 456.

34. Action against director for false representations in prospectus: *Clarke v. Dickson*, 6 C. B. N. S. 453; *Post FRAUD*.

35. Fraud of agent extends to corporation formed by him: *Cumberland Co. v. Sherman*, 1 M. R. 322.

36. Provisions of late California constitution regulating stock issues construed: *Ewing v. Oroville Co.*, 56 Cal. 649.

37. For defective organization or abuse of corporate powers the State only can interfere: *Doyle v. Peerless Co.*, 44 Barb. 239; *Post TRUST*.

38. Control of mine, as between superintendent and his employing company: *Sherman v. Clark*, 4 Nev. 138; *Post INJUNCTION*.

39. A stockholder is not a corporate agent: *Hopkins v. Roseclaire Co.*, 72 Ill. 373.

40. Admissions of corporate officers and agents—to what extent binding: *Shay v. Tuolumne Co.*, 6 Cal. 74; *Post EVIDENCE*; *Overman Co. v. American Co.*, 2 M. R. 251; *Green v. Ophir Co.*, 45 Cal. 522; *Post PRACTICE*; *Hanover Co. v. Ashland Co.*, 84 Pa. St. 279; *Post MEASURE OF DAMAGES*.

BREWER V. MARSHALL ET AL.

(19 New Jersey Equity, 537. Court of Errors and Appeals, 1868.)

Notice of covenant in title papers. The law conclusively charges the purchaser of lands with knowledge of a covenant in the deeds which constitutes the muniments of his title, that no marl should be sold from off such premises.

Incidents annexed to land—Contracts in restraint of trade. A covenant by the vendor of real estate that neither he nor his assigns will sell marl from off a tract adjoining the demised premises, will not be enforced in equity against the purchaser of such tract, because. 1. On the same principle incidents could be annexed to the land, as multiform as human caprice. 2. It is a plain contract against trade and traffic.

Rights incident to land enforced against purchaser with knowledge. Cases reviewed, illustrating the principle of preventing the alienation of lands, having knowledge of the just rights of another from defeating such rights, aside from the existence of an easement, or covenant adhering to the title.

The injunction in this case restrains the defendant, Marshall, from selling or removing from the farm conveyed to him by the defendant, Cheeseman, known as the Swope farm, any marl, and from digging any marl on it except for the use of the farm. The defendants have filed their answer, and move to dissolve the injunction.

The defendant, Cheeseman, was, in 1841, seized of a farm in the county of Gloucester, known as the Swope farm, on which there were valuable beds of marl. On the 23d of February, in that year, he conveyed to James W. Lamb two tracts of that farm, one a tract of forty-eight acres, lying east of the Cross Keys road, which divided the farm, and another of twelve and a half acres, lying west of the road, on Great Timber Creek, and which, in the deed, is described as "twelve acres and a half of marl land." The deed grants a right of way over a strip twenty feet in width from the road to the creek along the marl lot, and contains, in the description of the premises after the description of the way, these words: "Also the said George Cheeseman, his heirs or assigns, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property."

On the 14th of December, in the same year, Lamb conveyed back to Cheeseman the forty-eight acre lot. On the 3d of January, 1842, Cheeseman conveyed to Lamb another part of the Swope farm in two lots. One was a lot of seven acres adjoining the creek, and north of and adjoining the twelve and a half acre lot; the other was a strip of one acre, leading from the seven acre lot eastwardly to the road, and including the land over which the right of way had before been granted. On the same day Cheeseman executed to Lamb a bond in the penalty of \$5,000, secured by a mortgage on part of the Swope farm not conveyed. The conditions of the bond and mortgage (which were both in the same words), contained this recital: that Cheeseman, in consideration of \$1,650, had, by deed of the same date, conveyed to Lamb a lot of seven acres, part of the Swope farm; that the principal value of said lot consisted in the valuable beds of marl upon it; that there were divers like beds of marl upon the residue of the Swope farm; that said sum was paid, not only as the consideration for said lot, but upon the express agreement between the parties that neither Cheeseman, his heirs or assigns, nor any other person holding said farm, should, within thirty years from the date, dig, sell, remove, or suffer to be dug, sold, or removed from off the said farm, any part or parcel of the marl thereon, except for the use of the farm, "so that the said marl, or any part thereof, should not be sold or otherwise brought into competition with the marl of the said James W. Lamb," and upon the further agreement that for any violation of said covenant by the said Cheeseman, his heirs, executors, administrators or assigns, or other persons holding said farm under him or them, said Cheeseman, his heirs, executors or administrators should pay to said Lamb, his heirs, executors, administrators or assigns, the sum of \$500. The condition was, that if they did not so dig or sell, and if they paid up such penalties, the obligation and mortgage should be void.

On the 6th of September, 1842, Lamb conveyed back to Cheeseman the seven acre lot, except a triangular part containing about one tenth of an acre, retained to give access from the one acre strip (used as a way) to the twelve and a half acre lot, this being the means of communication from that lot to the Cross Keys road. Lamb conveyed the twelve and

a half acre lot, the one acre used for a way, and the tenth of an acre reserved from the seven acre lot, to the complainant Brewer, by two deeds, one dated March 3, 1847, the other dated January 3, 1848, the last deed conveyed the one acre used as a road, and the tenth of an acre reserved from the seven acre lot. And on the same day Lamb assigned to Brewer the bond and mortgage given to him by Cheeseman. Cheeseman, by four deeds made at different times, conveyed to the defendant, Marshall, the rest of the Swope farm not conveyed to Brewer.

Both the defendants have at different times dug, removed and sold from the seven acre tract and other parts of the Swope farm, marl by the ton and measured quantity, since 1842; and the defendant, Marshall, was continuing to do so until the injunction.

These facts appear by the bill and are admitted by the answer.

The opinion of the Chancellor is reported in 3 C. E. Green, 338.

BROWNING, for appellant.

J. WILSON, for respondents.

BEASLEY, C. J.

The facts out of which this controversy has arisen, so fully appear in the statement which prefaces this opinion, that I do not deem it necessary to repeat them *in extenso*. It will answer every present purpose to say that one George Cheeseman was originally the owner in fee of the several tracts of land now respectively owned by the appellant, Mr. Brewer, and by the respondent, Mr. Marshall; that on the 23d day of February, 1841, he conveyed to the grantor of the appellant the lands now held by the latter, and also by the same instrument another tract of twenty-eight acres, and that in this deed there was a covenant in the following words, viz: "Also the said George Cheeseman, his heirs or assigns, are not to sell any marl by the rood or quantity from off his premises adjoining the above property." The tract described in this covenant as that to which the restriction was to apply is now owned by the respondent, Mr.

Marshall, who, notwithstanding the covenant just quoted, has exercised and still claims the right to sell marl therefrom. Before proceeding to test the strength of this position it should be premised that this respondent is not in a situation to deny that, at the time he acquired his rights, he had notice of this covenant. The law conclusively charges him with such information, because the deed which contains this restrictive agreement constitutes one of the muniments of his own title. The covenant is contained in the conveyance of the forty-eight tract to the grantor of the appellant and that tract was re-conveyed by such grantor to Cheeseman, the original owner, who then conveyed it to the respondent, thus incorporating in the chain of the title of the latter the covenant in question. In this position of things the respondent is chargeable, by incontestable legal presumption, with full knowledge of the existence of the stipulation in question, for the rule upon that subject is settled by a long series of decisions, as will appear from the cases collected in the voluminous notes to the case of *LeNeve v. LeNeve*, 2 Lead. Cas. in Eq. 182. It is to be assumed, therefore, as an incontrovertible fact, that when the respondent took his conveyance he was aware that his grantor had covenanted, both for himself and his assigns, that no marl should be sold from off the premises so conveyed. This presumption obviously makes the attitude of the respondent an unfair one. He knew that Mr. Cheeseman's vendee, who is now represented by the appellant, had paid his money in purchase of this stipulation and in reliance on its honest performance, and consequently that it was the duty of Mr. Cheeseman, in the fair discharge of his obligation, not to sell this land free as to its uses. But the respondent stands upon his strict legal rights, and insists that the covenant in question is not either of a character to run with the title, nor to create an easement in the land, and that consequently, he takes such land, as the assignee of the covenantor, unbound by such obligation.

I think the Chancellor, in the opinion which he has sent up in this case, has clearly shown, that these premises, on which the defense has been rested, are well founded, for I quite agree that the covenant under consideration neither runs with the land, nor is it, in effect, the grant of an easement.

But the difficulty with me has been, whether granting these premises, the conclusion follows that the complainant is not entitled to relief in this court, the point is this: there is a class of cases in which equity will charge the conscience of an alienee of land with an agreement relating to such land, where clearly the agreement neither creates an easement nor runs with the title. This rule has been too frequently acted upon and is too deeply seated in our legal system, to be passed by unnoticed or to be rejected as unsound. I regard it as a part of the law. Thus, if title deeds be deposited as a security for money, and a creditor, knowing these facts, takes a subsequent mortgage on the same property, he will be postponed to the equitable mortgage of the prior creditor, and a trust will be raised in him to the amount of such equitable incumbrance. *Birch v. Ellames*, 2 Anst. 427. So if lands are held in trust, or the owner of lands is under a contract to sell or lease them, and a subsequent purchaser has notice of such facts, he will, in equity, stand in the place of his grantor and be chargeable with the same duties and contracts. "In such cases," says Judge Story, "he will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to theirs. It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes, by such conduct, *particeps criminis* with the fraudulent grantor." 1 Story's Eq. Jur., § 395. It will be observed that it is a feature common to all these instances, that the party in fault acquires the legal title in an unrestricted form, but in disregard of the known equitable rights of others, and that these same elements exist in the case now before this court. But there is also another clearly defined line of cases illustrative of the same rule. I mean that class of decisions which hold that an agreement between the owners of several parcels of lands, that the buildings to be erected thereon shall not be applied to certain specified uses, is obligatory. Such stipulations have been repeatedly held to be obligatory, not only upon such owners, but upon their alienees taking with notice. *Whatman v. Gibson*, 9 Sim. 196, was of this description. In that case the owner of a piece of ground, which was laid out in building lots, having sold some of them, he and the purchas-

ers executed a deed, whereby it was agreed that it should be a condition of the sale of all the lots, that the several proprietors should observe all the stipulations of the deed, among which was one prohibiting the use of any building as a tavern. This restriction was declared to be binding, in equity, on a purchaser with notice, although he had not executed the deed, but claimed derivatively through a purchaser who had. This decision, Sir Edward Sugden observes, is fully warranted by the older cases: *Vend. & Pur.*, 2 Vol. p. 185. And the same principle will be found exemplified in the following series of adjudications, which extend down almost to the present moment: *Tulk v. Moxhay*, 2 Phill. 774; *Coles v. Sims*, 5 De Gex M. & G. 1; *Mann v. Stephens*, 15 Sim. 36; *Western v. Mac Dermot*, Law Rep. 1 Eq. 499; S. C. Law Rep. 2 Ch. App. 72; *Bristow v. Wood*, 1 Coll. 480; *Brouwer v. Jones*, 23 Barb. 153; *Coleman v. Coleman*, 7 Harris, 100.

It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point. Thus in *Wilson v. Hart*, Law Rep. 1 Ch. App. 463, which was a suit to compel the observance of a covenant not to use any building erected on a building plot as a beer shop, the defendant who was the assignee of the covenantor, was enjoined, although Sir G. J. Turner, L. J., in delivering the judgment, declared that, in his opinion, the covenant did not run with the land, that it did not purport to bind assigns, and that it seemed to be a covenant directed not against the use of the land, but against the personal use and enjoyment of the building to be erected upon the land.

Nor is this doctrine without illustration in our own courts. It was enforced in the case of *Van Dorn v. Robinson*, 1 C. E. Green, 256. This was a suit founded on a covenant in a conveyance, whereby the grantee agreed to re-convey to the grantor whenever he, the grantee, should quit the actual possession of the premises. The grantee conveyed to a stranger who took the title with constructive notice of the covenant. Chancellor Green maintained that this was a mere personal

covenant; that it neither ran with the lands nor bound the alienee at law, but that it would be enforced against such alienee in equity, when he was chargeable with notice of the original contract. And in *Holsman v. Boiling Spring Bleach Co.*, 1 McCarter, 347, the same accurate jurist maintained the right of equity to exert its authority, in proper cases, to prevent injustice without any dependency on the merely legal rights of the parties. And I think it is also manifest from the case of *Rogers v. Danforth*, 1 Stockt. 294, that Chancellor Williamson was of the same mind on this subject, for he remarked, with reference to a covenant touching lands that he does not think that it follows that because a suit at law can not be maintained, a court of chancery may not protect the rights of the parties under it.

From this review of the authorities, I am entirely satisfied that a court of equity will sometimes impose the burthen of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title. So far I think the law is not in doubt, and the only question in this case, which I have regarded as possessed of any material difficulty, is whether the covenant now in controversy is embraced within the proper limits of this branch of equitable jurisdiction. The inquiry is, have courts of equity ever gone the length of enforcing contracts similar to the one now before us? My conclusion is, that this question should be answered in the negative, and for the reasons following, viz.: First, because the enforcement of this covenant between the parties to this suit would establish a principle which must inevitably overturn, by the application of equitable principles, the entire doctrine which prevails in courts of law, that covenants, as a general thing, will not run as a burthen upon land. That this would be the result, I think will become at once apparent to any person who will carefully compare the present covenant with those which have been decided to be incapable of enforcement as not running with the title. It has been remarked, and I think upon solid grounds, that with regard to mere legal remedies, there appears to be no authority for saying that the burthen of a covenant will run with land in any case except that of landlord and tenant: *Notes to Spencer's case*,

1 Smith's L. C. 138. This is the admitted rule at law; but if this complainant is to be relieved, then in equity we have the opposite rule, that all covenants touching land, which are known to the purchaser at the time of the transfer to him, become attached to the land, and will descend with the title, under similar conditions, to the remotest alienee. The extent of such a doctrine is this: that the owner of land may impress upon it any of his notions, and equity will see that the land shall retain such impress in the hands of every subsequent holder. Let us test the principle by example. A is the owner of land and he covenants with B, that neither he, A, nor his assigns, will ever raise any grain on such land, or will ever permit a dwelling-house to be put thereon. It is clear that, at law, such covenants as these will not become parcel of the land so as to fetter it in its devolutions. The remedy for their breach, if intrinsically legal, is by suit against the original covenantor. But if an agreement that marl shall not be sold from a certain tract of land will pass as a burthen upon such land in equity, it will be difficult to hold that in the examples just put the same result is not to obtain. Thus incidents can be annexed to land, as multiform and as innumerable as human caprice. The inconvenience of giving such latitude to the power of the owner of lands, is forcibly put by Lord Brougham in the case of *Keppell v. Bailey*, 2 Mylne & K. 517. "Every close, every messuage," such is his language, "might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations on the premises, besides many other restraints as infinite in variety as the imagination can conceive." These are the evils which I think will unavoidably result from adopting any principle which will sustain the bill in this case. If we enforce the covenant now under consideration, I do not know

on what theory we could refuse to execute any covenant which has for its purpose any conceivable restriction placed upon the free enjoyment of lands. I can not think it proper to go this length. No case has as yet been so extreme as this; and I can perceive no good reason, but much inconvenience in enlarging the sphere of this rule in equity. In my judgment, the decisions in this branch should be followed but not transcended. If this, then, were the only objection to the case of the complainant, I should be opposed to granting him the relief for which he asks.

But in the second place, it seems to me that this covenant, on which this suit rests, is illegal in itself and absolutely void. The substance of this covenant is, that neither the former owner of these premises nor his assigns shall sell by the quantity any marl taken from these lands. This is not a restriction on the use of the land, for the marl can be dug up and used upon the land; but the restriction is on the sale of the marl after it shall have been dug up. Marl, of course, is an article of merchandise, and the covenant restrains traffic in that article. It prohibits the sale of it at any time, in any market, either by the owner of the lands or by his assigns. Now it seems to me that this is a plain contract "against trade and traffic, and bargaining and contracting between man and man." That it is the rule that all general restraints of trade are illegal, has never been doubted since the famous opinion of Lord Macclesfield in *Mitchel v. Reynolds*, reported in 1 P. Wms. 181. And the development of this rule, and its application under a variety of conditions, can be traced in the series of decisions which have been carefully collected and intelligently commented on in the notes to the case just cited in 1 Smith's L. C. 182. The reason upon which this rule is founded, is thus expressed by Mr. Justice Best, in *Homer v. Ashford*, 3 Bing. 326: "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void." And so far has this principle been carried, that even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly held that such

agreement will be void, unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other: *Horner v. Graves*, 7 Bing. 743. Tested by these principles, the covenant in question appears to be destitute of all the essentials of a legal agreement. The restraint it imposes is general, both as to time, place, and persons. It transcends, by far, the limits of utility to the covenantee. I can not say that this covenant is legal, any more than I can say that a covenant on the part of a farmer not to sell, nor permit any of the future owners of his farm to sell, any grain to be grown on his farm, would be legal. I think all such engagements are nugatory as opposed to the valuable rule of law just referred to, and which is designed and is so well adapted to promote commerce by preventing the imposition of all unnecessary trammels, either on labor or on property. In this view, I am prepared to say that the complainant's case has no legal foundation.

In conclusion, I may say that I have not overlooked the claim of the appellant to restrict the use of the lands of the respondent by force of the covenant contained in the bond and mortgage of the date of the 23d January, 1842. This covenant would be quite as objectionable as the one already considered with regard to imposing incidents on real property so as to pass with the same from hand to hand. It is liable, therefore, to the first objection above stated by me, and which I think decisive of this controversy. Nor, in my opinion, can it be said to be beyond the scope of the second objection. It is to the effect that the marl from the lands of the covenantor shall not be sold so as to be brought into competition with the marl of the covenantee. It is obvious that under so broad a covenant as this, the covenantee could drive the covenantor from every accessible market in the country. I do not find any case which sanctions so broad a restriction. But it is not necessary to pursue this inquiry, for as this case is now presented the complainant is not in a position to ask the aid of this court with regard to this covenant embodied in the bond and mortgage. It will be observed that this agreement prohibits the selling of marl taken from the lands adjoining the seven acre tract, so as to bring such marl in competition with

that to be derived from such tract. The appellant is now the owner of but a small part of this seven acre tract, and from which portion he has never taken any marl. If it be true, then, that the respondent has taken or intends to take marl from his property which adjoins the seven acre tract, such acts can not be even technical breaches of the covenant now in question, for as the appellant has not worked that portion of the seven acre tract which still remains to him, it is obvious that the prohibited competition has not occurred. In this respect, the appellant has not suffered, nor is he threatened with substantial loss, and, consequently, on this head has no standing in a court of equity.

On these grounds, I think the decree of the Chancellor should be affirmed with costs.

The decree was affirmed by the following vote:

For affirmance—BEASLEY, C. J., BEDLE, DALRIMPLE, DEPUE, VAIL, VREDENBURGH, WALES, WOODHULL, 8.

For reversal—CLEMENT, KENNEDY, OGDEN, OLDEN, 4.

BRANDLING V. OWEN.

(2 Vernon, 462. High Court of Chancery, 1704.)

Cheating by oversizing the measure for weight wagons. Upon bill to redeem a colliery which had been first leased and then mortgaged, plaintiff alleged: 1. That defendant had not left sufficient pillars; and, 2. That he, having to pay by the ton, made his wagons of a larger size. The court left him to his remedy in damages upon the first item, but as to the over size of the wagons, directed an issue at law.

The plaintiff first made a lease to the defendant Owen of a colliery, and afterward mortgaged to him the manor of Felling and the colliery; the bill was to redeem. The plaintiff insisted the defendant had broken the covenants in his lease, by not having left sufficient baulks and pillars to support the work; and secondly, being by his lease to pay 10s. for every ton of coals, he had made his wagons of a larger size than ordinary, to defraud him in that particular.

The court left him to recover damages at law, as he could, on the collateral covenants for not working of the colliery;

and such damages were not to be brought into the account of redemption.

But as to the over size of the wagons, directed an issue at law.

FOLEY V. FLETCHER ET AL.

(3 Hurlstone & N. 769. Court of Exchequer, 1858.)

Proviso deferring right to suit after breach. Where there is a covenant to pay money by a day certain, with a *proviso* that no action shall be brought till after the expiration of a month, the action is premature if brought within the month.

¹ **Annual payments, not annual profits.** Payments of purchase money by annual payments are not annuities, annual profits or gains—under the income tax acts.

A proviso in the same deed with the covenant qualifies and controls the covenant.

The declaration stated that by indenture between Sir F. Scott of the first part, the plaintiff of the second part, the defendants of the third part, and W. Matthews and W. Hatton of the fourth part; reciting that Sir F. Scott was seized in fee of one moiety and the plaintiff of the other moiety of certain buildings, lands, and mines therein described, etc.; and reciting that the defendants were partners in the business of coal and iron masters, and in the said buildings, land and mines; and that Sir F. Scott and the plaintiff had agreed with the defendants for the sale to them of the buildings, lands, mines, colliery, engines and plant for £99,000; and that the buildings, lands, mines, etc., should be conveyed to Matthews and Hatton upon the trusts therein declared. It was witnessed, that in consideration of £6,770, before the execution of the indenture paid by the defendant to Sir F. Scott, and the plaintiff in moieties, and of £92,230, residue of the sum of £99,000, to be paid by the several installments therein mentioned, Sir F. Scott and the plaintiff did grant, release, and convey, and the defendants confirmed, to Mat-

¹ *Brook v. Badley*, L. R. 4 Eq. 106. *Post* RENTS.

thews and Hatton, the buildings, lands, mines, etc., to the use of Matthews and Hatton forever, upon certain trusts, etc.; and the defendants did, by the said indenture, covenant to pay to Sir F. Scott £46,115, being one equal half part, etc.; and did also covenant with the plaintiff that the defendants would pay, or cause to be paid, to the plaintiff £46,115, being the other equal moiety or half part of the said sum of £92,230, by the several installments and proportions, and at the several times, and subject to the provisos and agreements, and otherwise in the manner thereafter expressed, viz.: the sum of £768, 11s. 8d. on every 24th day of June and 24th day of December in every year after the year of our Lord 1854, until and inclusive of the 24th day of December, 1884; the first installment to commence on the 24th of June, 1855, and subject, nevertheless, to such eventual acceleration or variation of the time or times of payment as therein mentioned. And in case either of the installments or sums of £768, 11s. 8d. should not be fully paid by the defendants upon the day appointed for payment thereof, or within one calendar month next after the same day, and should not have been previously satisfied, pursuant to any of the provisions of the indenture, then the defendants should, upon demand, or in default of demand, pay to the plaintiff interest at the rate of £4 per cent. upon the installment, or upon each such installment which for the time being should be in arrear and unpaid; and such interest should be computed from the 24th of June or 24th of December, as the case may be, upon which the installment should have become payable, or, as the case might require, should be computed from the then last preceding day for payment of interest upon the installments so in arrear; and that every payment thereinbefore covenanted to be made should be so made without any deduction, except in respect of any property or income tax which ought in law to be so deducted from such interest.—Averment: that the acceleration or variation of the time of payment depended upon events which had not happened.

Breaches:—First, that the 24th of June and the 24th of December in the years of our Lord 1855, 1856 and 1857, had elapsed, but the defendants had not paid the six installments due. Secondly, that though the installments were not paid

on the appointed days respectively or within one calendar month after those days respectively, the defendants had not paid interest, etc.

Second plea.—As to the installments due on the 24th of December, 1857, that by the said indenture it was provided and agreed that no installment or other principal sum for the time being payable under or pursuant to the covenants and provisions therein contained, should be recoverable or capable of being enforced, nor should any proceeding for that purpose be commenced until after the expiration of one calendar month from the day upon which the same installment or sum should have become payable, under or pursuant to the covenants and provisions therein contained; nor should any interest accrue or become payable in respect thereof until the expiration of such calendar month; and that one calendar month from the day upon which the last-mentioned installment or sum became payable under or pursuant to the covenants and provisions contained in the said indenture, had not expired before this suit.

Fourth plea.—As to £236, 7s. 8d., parcel of the installments, that in making payment of the said installments respectively, the defendants deducted and retained out of the said installments respectively divers sums of money, amounting in the whole to the sum of £236, 7s. 8d., being the amount of the rate of duty which at the times when the said installments respectively became payable, was payable under the statute, (16 & 17 Vict. C. 34,) and that by such deduction and by virtue of such statute they were acquitted and discharged of the sum of £236, 7s. 8d.

The plaintiff demurred to these pleas and the defendants joined in demurrer.

ATHERTON (with whom was GRAY), in support of the demurrers.

First, the second plea is bad because the covenant is absolute to pay the installment on the 24th of December. The proviso in the indenture that no installment shall be recoverable or capable of being enforced and that no proceeding for that purpose shall be commenced till after the expiration of a

month, amounts merely to a covenant not to sue for a month, and can not therefore be pleaded in bar of the action: *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. Vol. 63). The defendants must contend that the proviso is a qualification of the covenant making the installments due and payable not in June and December but in July and January. Now looking at the whole deed the installments are due on the days named for payment. If the plaintiff were to die between the 24th of June and the 24th of July in any year the debt would go to her executors. In case of the defendant's bankruptcy the debt might be treated as actually due before the expiration of the month.

Secondly, the fourth plea is bad.—The argument for the defendants must amount to this: First, that where the purchase money of an estate is payable by installments, the installments are subject to income tax; a charge which the gross sum would have escaped. Secondly, that the income tax must be paid in the first instance by the purchaser. Now the 16 and 17 Vict., c. 34, Sect. 5, enacts that the duties thereby granted shall be assessed, raised, levied and collected under the provisions of the 5 & 6 Vict., c. 35, which is revived for that purpose. The 40th section of the latter act enacts, that every person who shall be liable to the payment of any "annuity or other annual payment, either as a charge on any property, or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled, etc., on making such payment, to deduct and retain thereout the amount of the rate of duty which, at the time when such payment becomes due, shall be payable under this act, etc., and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount to, as if the amount thereof had actually been paid unto the person to whom such payment shall have • been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction upon the receipt of the residue of such money," etc.

In order to show a right to deduct, the defendants must first show that they are chargeable in respect of these installments. [WATSON, B.—The 40th section is a regulating and not a charging section; it imposes no new duty.] The defend-

ants must show that, under schedule D in sec. 2 of the 16 and 17 Vict., c. 34, the installments are liable to income tax. They must allege that the installments are "annuities or other annual profits or gains." But they are not so. The 102d section of the 5 & 6 Vict., c. 35, is the provision under which, if at all, this duty would be levied on the defendants. That is, in terms, a charging section; it empowers the parties paying any annuities or annual payments "out of profits or gains" chargeable by virtue of that act, "out of any annual payment liable to deduction, or from which a deduction hath been made," to deduct out of such annual payments 7*d.* in the pound. Schedule D in sect. 2, of the 16 and 17 Vict., c. 34, contains a clause, in addition to those in schedule D, sect. 1, of the earlier act, as follows:—And for and in respect of all interest of money, annuities and other annual profits and gains not charged by virtue of any of the other schedules contained in this act." This clause is in effect substituted for sect. 102 of the 5 & 6 Vict., c. 35, and it relates solely to such annual payment as are annual profits or gains. [CHANNALL, B.—*Taylor v. Evans*, *H. & N.* 101, was argued as if the question depended wholly on sect. 102.] If the question depends upon that section the defendants can not deduct the income tax, because the payment is not made out of profits or gains. Whether they work the mines or not they must pay the installments. [BRAMWELL, B.—Suppose a person covenants to pay an annuity; can he deduct income tax?] The annuity is liable to income tax, but whether the person paying or person receiving it must be assessed would appear from sect. 102, to depend upon whether it is made payable out of profits and gains, or not.

PHIPSON, for the defendants.—As to the first point. It is not disputed that a covenant not to sue for a limited time for a debt actually due and payable can not be pleaded in bar: *Aloff v. Scrimshaw*, 2 Salk. 573; *Thimbleby v. Barron*, 3 M. & W. 210. In the present instance, however, the proviso is incorporated in the covenant, and qualifies it. Therefore the effect is, not that the creditor agrees not to sue, but that the debt is made not enforceable till the expiration of a month. The case is similar to that of *Trott v. Smith*, 10 M. & W.

453. (In error, 12 M. & W. 688, 701.) The month's time which the defendants have for payment resembles the days of grace on a bill of exchange, in which there is a written contract to pay on a certain day, but, by the custom of merchants, payment is not enforceable till three days after. This, therefore, is not like the case of a debt absolutely due, with a collateral covenant not to sue.

Then, as to the fourth plea. First, these installments are chargeable with income tax. Nothing but annual profits are chargeable under the schedules in the 5 & 6 Vict., c. 35. But sect. 102 is an independent charging section, and it imposes duty upon "annual payments," "as a personal debt or obligation by virtue of any contract." The party paying the installments is bound to make a return of all his profits and gains, and may deduct the income tax from the payments out of them.

If a person chooses to turn his capital into annual income, income tax will attach upon it. In *Taylor v. Evans*, 1 H. & N. 101, there was a conveyance of mineral property for fifty years for the sum of £1,380, payable by annual installments of not less than £150. It was a mere personal covenant to pay. The judgment assumes that some one was liable to income tax. [POLLOCK, C. B.—There the land was not absolutely sold.] It was a sale of the coal mine in fee, because the coal would be worked out in fifty years. In *Edmonds v. Eastwood*, 2 H. & N. 811, a tenant was held to have a right to deduct income tax on royalties in respect of earth taken for bricks. [POLLOCK, C. B.—There the payments were reserved as rent.] It would never have been necessary for the defendants to show that they had paid income tax *on these sums specifically*. If there had been an assessment *on the whole* of the defendants' gains and profits *out of which* the annual payments are made, it would have been enough to entitle them to deduct the money. That appears from sect. 104. [WATSON, B.—Suppose the mine was worked at a profit of £100 a year; what would the defendants be entitled to deduct?] By sect. 104, they could only have deducted on proof to the satisfaction of the commissioners that they had in fact paid the tax.

The annual payments here were profits. There is nothing

to show that the defendants ever agreed to pay £45,000 for the plaintiff's moiety, except upon the terms that the payment should be spread over a period of thirty years. The plaintiff therefore has converted her capital into an annual payment or annuity. By so mixing up capital with the gains and profits upon it, the capital and profits are inseparable, and the court will therefore take judicial notice that the annual payments are gains and profits made by allowing payment to be deferred. This case does not resemble one where a certain specific debt is paid by installments of capital. There the court can see that the payments are not gains and profits, and therefore income tax would not attach. Secondly, assuming the income tax to be payable, under the 104th section of 5 and 6 Vict., c. 35, the defendants would have had no right to deduct it except on proof of payment. But the 16 and 17 Vict., c. 34, § 40, enables persons "liable to the payment" "of any annual payment" "as a personal debt or obligation by virtue of any contract" to deduct the income tax from the payments. [BRAMWELL, B.—Might not the plaintiff herself be assessed if anyone is liable to be so?] That must be admitted. [BRAMWELL, B.—Suppose the defendants had an income of less than £100 a year, and were therefore not themselves chargeable, would they be at liberty to deduct the income tax under the 40th section?] That case might present some difficulty; but the enactment in section 40 is positive, and applies in terms to the present case.

GRAY replied.

POLLOCK, C. B.

The defendants are entitled to judgment on the demurrer to the second plea, and the plaintiff on the demurrer to the fourth plea. The demurrer to the second plea raises the question whether, where a deed contains a covenant for payment of money on a particular day, subject to a proviso that no action shall be brought till after the expiration of a month, if such action is brought before the end of the month, it is not brought too soon. The covenant is mixed up with the proviso in the deed and the case is therefore not like that of a mere naked covenant to pay, with an independent proviso in another

part of the deed, that no action should be brought for such a period. The covenant is to pay the installments, "subject to provisos therein expressed." The proviso must be construed as extending the time for payment. The stipulation for the payment of interest makes the matter more clear. In case either of the installments shall not be paid on the day appointed for payment, or within one calendar month after the said day, interest is to be payable, to be computed from the same day. The object is to create a motive to pay within the month; but we think that no action can be maintained until after the expiration of the month.

The question upon the fourth plea turns upon whether this is an annuity or annual payment liable to income tax under either the first or second act referred to. Both of them have substantially the same title: "An act for granting to her Majesty duties on profits arising from property, professions, trades and offices." We must read the enactments with reference to this, that the duties are to be levied on profits and not on anything else. The several schedules of the first act are: (A) for all lauds and tenements in respect of the property thereof; (B) for land in respect of the occupation thereof; (C) upon all profits arising from annuities, dividends out of any public revenue, etc.; (D) upon all profits or gains, from any kind of property whatever, whether in Great Britain or elsewhere, or from any profession, trade, or employment; (E) upon every public office or annuity payable out of the public revenue. These were the several matters liable to be taxed; and the question is, whether on the sale of an estate which professes to be for the sum of £99,000, of which a part is paid down, and a part paid by installments, extending over a long period of years, such installments are to be considered as an annuity or annual payment, and liable to income tax. Mr. PHIPSON contended that they were profits, because, when the value of money and the effect of such a protracted period of payment are considered, we could not assume that the value of the plaintiff's moiety was more than £23,000, and that the rest must be considered as profit, and that it was the fault of the plaintiff that she had so mixed up profits with capital that they can not be distinguished; and that therefore the whole must be liable to income tax. But there is nothing

on this record to show that the property was worth more than £99,000; nor is there anything to show that the postponement of payment was not a mere indulgence on the part of the seller. But if we were at liberty to speculate on the matter, and could come to the conclusion that a part of the annual payments is the price of the convenience of getting the payment postponed, we could not say that the payments are within the act because a part of them consists of profit. These installments are payments of money due as capital: the act has made no provision for such a case. It professes to charge profits only, and we can not say that capital is liable to the income tax because found in company with profits. If payments such as those in the present case are subject to income tax, wherever any debt of any sort is to be repaid by annual payments, or by installments at three or six months, it would be subject to income tax. I think, therefore, that the 102d section of the 5th and 6th Vict., c. 35, must be read thus:—"Be it enacted, that upon all annuities, yearly interest of money, or other annual payments (*ejusdem generis*), either as a charge on any property of the person paying the same, by virtue of any deed or will, or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract"; and it must be taken expressly to exclude contracts to repay debts. If profits are mixed up with the debt they will not make the debt liable. Mr. PHIPSON adverted to the 40th section of the 16 and 17 Vict., c. 34. That section refers to "every person who shall be liable to the payment of any yearly interest of money, or any annuity or other annual payment" (that must be *ejusdem generis*); "either as a charge on any property or as a personal debt or obligation, by virtue of any contract"—(*ejusdem generis*). If the annual payment is the repayment of principal, the return of a debt, and is not profit, it is not at all within the purview of the act, the very title and all the provisions of which announce that it is for imposing a tax on profits. If there is the purchase of an annuity, that annuity is made chargeable in express terms. But this is not contract to pay an annuity, but to pay a principal sum of money, and the court can only carry into effect the language of the act. The section goes on—

"Whether the same shall be received or payable half-yearly,

or at any shorter or more distant periods," the person paying shall be entitled, on making such payment, to deduct the duty, which, at the time when such payment became due, shall be payable under the act. During a part of the argument, it was supposed that the act applied only to annual payments, but that is not so. If Mr. PHIPSON is right, the tax would attach on promissory notes payable by installments. There might be some difficulty if the 40th section stood alone. But the question what is meant by "annuity or other annual payment," is explained by schedule D of the act itself, the 16 & 17 Vict., c. 34, which has these words: "And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of the other schedules." It therefore applies only where the annual payment is in the nature of a profit. Now, reading that with the 40th section, it shows the meaning to be that every person who shall be liable to the payment of any annuity or other annual payment (*i. e.*, liable to be charged with duty) shall be entitled to deduct.

Section 40 does not apply to any case where that which is paid is not distinctly profit. If the plaintiff had sold her estate for an annuity, so calling it, the annuity would have been liable to income tax. But as she sold it for a sum which is payable by installments which is, therefore, not chargeable; and the defendants had no right under the 40th section to deduct the income tax.

BRAMWELL, B.—I am also of opinion that the defendants are entitled to judgment on the second plea

On the other question I think that our judgment must be for the plaintiff. I am desirous to say that I disclaim in this case acting on the maxim, that a burden shall not be imposed on the public unless by clear and unambiguous language. In *Re Micklethwait*, 11 Exch. 452, 456, PARKE, B. says: "It is a well established rule that the subject is not to be taxed without clear words for that purpose; and also that every act of Parliament is to be read according to the natural construction of its words."

The latter is the main rule, the other subordinate. Construe the statute correctly, if its meaning can be ascertained.

Maxims of the sort referred to, as frequently applied, are mere invitations to erroneous construction, though when properly understood they are quite correct. The natural course of things is, that the heir takes on the death of the person last seized; whoever seeks to disturb that rule must make out his right to do so. So, whoever seeks to impose a tax or penalty must establish the right; whoever seeks to punish must establish the guilt. The rule properly understood is, that the burden of proof is on the assertor—not that, wherever there is any doubt, a statute is to be said not to mean what it does mean. On this head I can not help referring to that accomplished lawyer and jurist, Mr. Sedgwick; he says (Sedgwick on Statutory and Constitutional Law, p. 334):—"These decisions, as I have said, naturally modify the old rule that penal statutes are to be construed strictly. The more correct version of the doctrine appears to be that the statutes of this class are to be fairly construed and faithfully applied, according to the intent of the legislature, without unwarrantable severity on the one hand; or equally unjustifiable lenity on the other, in cases of the courts inclining to mercy." And afterward, at page 336, he says:—

"These decisions show the gradual tendency of the judicial mind to disavow and renounce any right to construe statutes according to considerations of policy or hardship; and to recognize the duty of conforming on all occasions to the will of the law-making body." And in a note at p. 335, he very pertinently asks "whether all laws must not be supposed intended to 'effect a public good'? and whether the effort 'to accomplish the intention of the legislature' should be in any more earnest in this case than in all others?" These are the principles and considerations which I think ought to govern me in considering this case. But I think, consistently with them, that the plaintiff is entitled to judgment on the fourth plea. I can not assent to Mr. PHIPSON's first proposition, and admit that this payment is liable to duty. I entertain very considerable doubt upon the matter. The installments are the payment of the price of an estate deferred for thirty years, the total amount of which is probably about double the sum which would have been paid, if paid down at once. It may be that the sellers have been content to forego interest; but the presumption is,

that the amount consists partly of principal and partly of interest. Were we at liberty to consider the case independently of express enactment, I should say that it would be reasonable to ascertain how much is the payment of principal, and how much is interest. But all speculation is at an end if the words and the meaning of the statute are plain. Now, inasmuch as the statute imposes a duty on the whole of an annuity, without discriminating between that part of it which is repayment of principal and that which is interest, I should say, that if there was no injustice in imposing the duty on a sum analogous to an annuity; though it is difficult to say that an annuity has anything in common with this payment except its annuality. In one sense it is a question of words, because, if these payments were called an annuity, income tax would doubtless be payable upon them. It was urged also that persons will not mix up interest and principal to escape the payment of duty. No doubt these arguments are very cogent. But by "an Act for granting to her Majesty duties on profits arising from property, professions, trade and office," it can not be taken that the legislature meant to impose a duty on that which is not profit derived from property, but the price of it. On looking at schedule D of the 506 Vict., c. 35, it seems susceptible of this interpretation, that everything is to be referred to the title and prior part of the act; and then this expression, "the last mentioned duties extend to every description of property or profit not in the schedules A, B, C," will refer to property or profits of the same description as in those schedules; and then when we find in section 102, "all annuities, yearly interest of money or other annual payments," it seems not an unreasonable construction to say (leaving out the word annuities) that the intention is to charge yearly interest of money and other annual payments *ejusdem generis*, that is, within the description of profits; and then, substantively all annuities. Mr. PHIPSON's argument would show that it would be reasonable the payment should be divided into two parts, principal and interest. Acting on the principle that the affirmative of the proposition must be made out by those who seek to impose the tax.

I can not say that such affirmative has been established to my satisfaction. But assuming that it has been, and that

duty is payable on the annual installments, Mr. PHIPSON is compelled to admit that the plaintiff herself might have been assessed. Now, if the plaintiff may be compelled to make a return and pay herself in respect of the installments, it can not be that the defendants can deduct the income tax before making the payments. Mr. PHIPSON says that the language of section 40 is positive. One would think, reading the words of that section alone, that nothing could be plainer. This is an annual payment; how then does it not apply? In some way we *must* hold that it does not apply, because otherwise the plaintiff would be liable to pay income tax twice over. Now the expression "liable to payment," is peculiar. I think it means, "where any person is the owner of any property out of which a sum of money is payable, which is an annuity or annual payment, though payable as a personal debt or by virtue of any contract." It appears absolutely necessary to put a non-natural construction upon the language of this section. The argument was urged to this extent, that even if the person paying is not liable to duty, as if his income tax is not sufficiently large to render him liable, he may deduct income tax which he is not liable to pay. That can not be so. Therefore, though feeling the greatest doubt on the subject, I think the plaintiff is entitled to judgment; first, because this is not an annual payment liable to income tax; secondly, because, even if it is, the defendants can have no right to deduct income tax in respect of the whole of each payment. I own I feel the greatest doubt, because both the grounds of my decision are founded on a construction of the act which does violence to the words of it.

WATSON, B.—I am also of opinion that the defendants are entitled to judgment upon the second plea, for the reasons which have been assigned by the Lord Chief Baron, and that the plaintiff is entitled to judgment on the fourth plea. It is a startling proposition that income tax attaches upon debts payable by installments. It is a tax upon income; the title of the act shows it, and, reading schedules A, B, C, D, and E of the 5 & 6 Vict., c. 35, it is obviously a yearly tax on what is called throughout income, and profits and gains. The 15 & 16 Vict., c. 34, contains similar heads of taxable matters,

all of them treating that on which the tax is to attach as profit or income. The 102d section of the 5 & 6 Vict., c. 35, is relied upon by the defendants, and this payment is said to fall within the description of an annuity. But an annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity. Annuities are made chargeable by express words. The words "other annual payments," in the same section means payments *ejusdem generis*, viz., as profits.

Take the case of a will giving to a legatee, money payable by installments; as, for instance, £10,000, £5,000 payable at the end of the first, and £5,000 at the end of the second year after the testator's death. The sums as bequeathed would not be an annuity, and would be chargeable, not as income, but under the Legacy or Succession Duty Acts. If a person covenanted to pay an annual sum, not being the payment of a debt by installments,—as to pay £10 a year to a particular person, such payment would be chargeable with income tax. But there is not a word in the act that leads to the inference that a debt payable by installments is chargeable with income tax; and moreover, a tax can not be imposed by implication. The same question might have arisen if it had been agreed that the payments to the plaintiff should be made by two installments. It is impossible to suppose that income tax could attach in such a case, it being a tax upon income, and not upon capital. Then, again, it is said that these payments are compounded of interest and principal. Possibly profit is obtained by the postponement of the payment, but the court can not say that any part of it is interest. As to the other point. By the 16 and 17 Vict., c. 34, the several sections of the first act are re-enacted, and the 40th section of that act provides that a person liable to the payment of "any annuity or other annual payment, either as a charge on any property, or as a personal debt by virtue of any contract," shall be entitled, "on making such payment, to deduct and retain thereout, the amount of the rate of duty which at the time when such payment becomes due, shall be payable under the act." The true meaning of that is, that where the party has been assessed to the income tax, he may deduct it, though he has

not actually paid the money. Could income tax have been assessed on the defendants in respect of this payment? Mr. PHIPSON says that the defendants are chargeable because they are in possession of the land. I do not see how a person, covenanting to pay the purchase money of an estate by installments, can be charged in respect of such payment. It does not appear as a fact that the defendants are in possession of the land, and there are no provisions for assessing the duty on them. The Crown would therefore have no remedy, and the defendants would get money which they might keep, if we held that they were at liberty to make a deduction on account of income tax.

CHANNALL, B.—I concur with the rest of the court in thinking that our judgment ought to be for the defendants on the demurrer to the second plea, and for the plaintiff on the demurrer to the fourth plea. The question raised upon the second plea is whether the plaintiff commenced this action before she had a right to do so. The defendants rely upon a proviso that no action shall be brought till the expiration of one calendar month from the time the installment sued for was in point of fact made payable, and allege that the proviso amounts to a covenant not to sue, and does not qualify the covenant for payment of the installments. It is not disputed that a covenant not to sue for a definite time, generally speaking, can not be pleaded as an answer to an action. That is clearly so where the covenant not to sue for a definite period is not contained in the same deed which contains the covenant on which the action is brought. Here, however, the qualifying matter is contained in the same deed. The whole of that instrument must be taken together, to see whether, putting a reasonable construction on every part of the deed, it was not the intention of the parties that these installments should not be the subject of suit before a certain day. The Lord Chief Baron has pointed out that the covenant is not absolute, but to pay subject to the proviso. That introduces the proviso into the covenant itself.

The fact that interest is not payable on the installments unless more than one month has elapsed after the time named for the payment, assists the argument for the defendants, that

the covenant must be construed as a covenant to pay on a given day if the covenantors thought fit, but not so as to render them liable to an action until the expiration of one month from that day.

With regard to the fourth plea.—The contract being to pay a certain sum as the purchase money of an estate, part down and the residue by installments, the question is whether the installments are annual payments in respect of which income tax is payable; in other words, whether the installments are “an annuity or yearly interest of money or other annual payment” within the 102d section of the 5 & 6 Vict., c. 35, so as to be subject to assessment as income. In my opinion they are not. I think that the words do not include installments which are part of a capital sum. To hold that the installments are liable to income tax would be in effect to tax that which is capital and not income.

(His lordship read the 102d section of the 5 & 6 Vict., c. 35.) It is clear that the proviso in this section need not be co-extensive with the enacting clause. But it has no operation except with reference to cases within the enacting clause. I am of opinion that the words “all annuities, yearly interest of money, or other annual payments,” do not include those payments which are in respect of the purchase money of an estate, and are in the nature of capital and not of income. We are not dealing with the question whether income tax might be payable in respect of such part of each installment as consists of interest, but whether it is payable on the installment itself. It was admitted by Mr. PHIPSON that, supposing the words “all annuities, yearly interest of money, or other annual payments,” in the 102d section of the 5 & 6 Vict., c. 35, did not include those payments, the act of the 16 & 17 Vict., c. 34, would not assist him. However, but for the 40th section of that act, the plea would be open to the objection that it did not appear that the profits and gains out of which the annual payments were made had been brought into charge.

If that had been the only objection, the 16 & 17 Vict., c. 34, s. 40, would assist the defendants. But, for the reasons given by my brother Bramwell, I am of opinion that it is not so. The 40th section was not intended to introduce a new

clause to provide for annual payments not included in the old act.

Judgment for the defendants on the second plea, and for the plaintiff on the fourth plea.

ESHELMAN V. THOMPSON.

(62 Pennsylvania State, 495. Supreme Court, 1869.)

Contract to pay royalty—Affidavit of defense—Practice. Articles of agreement in which a party agreed to mine on the land of the other party and take out 8,000 tons per annum, and pay therefor 15 cents per ton, is not "an instrument of writing for the payment of money" requiring an affidavit of defense, where the action is covenant for damages for non-performance; otherwise, if the suit had been for the agreed rate for any certain number of tons mined.

Error to the Court of Common Pleas of Indiana County.

This was an action of covenant brought by Hugh A. Thompson against B. L. Eshelman, Thomas Gorman and Charles Hammer. The writ was returned "summoned" as to Eshelman, and "nihil" as to the other defendants.

The plaintiff declared on an agreement made Oct. 1, 1864, between himself and the defendants, by which he granted to the defendants the right to mine and carry away, for ten years the fossil coal out of a tract of land in Burrell township, Indiana county; in consideration of which the defendants agreed to pay the plaintiff 15 cents per ton for all the coal mined, the weight to be ascertained in the manner specified in the agreement; the defendants to pay the plaintiff, on or before the 15th day of each month, "the rent for the coal mined" during the month next preceding; the defendants, at their own cost, to put up and maintain the necessary houses, fixtures, etc., to be taken at the end of the term by the plaintiff at a valuation, ascertained in a mode specified in the agreement; the defendants to work the mines with diligence, and mine and carry away during every year of the term 8,000 tons, "unless they shall show some sufficient and reasonable obstacle to prevent them so doing." The defend-

ants further covenanted to mine, etc., in a workmanlike manner. The parties were to sustain the relation of landlord and tenant, and all laws for distraining, etc., for rent to extend to this lease. The breach set out was, that the defendants had not mined 8,000 tons of coal per year, nor paid 15 cents per ton therefor, nor shown any reasonable obstacle for not having so done, nor put up any buildings, etc., nor performed any of the other stipulations in the agreement. A copy of the agreement was filed with the declaration.

A judgment was taken against Eshelman for \$2,095, for want of an affidavit of defense.

An Act of Assembly relating to Indiana county provides, that "in all actions brought on bills, notes, bonds and other instruments of writing for the payment of money, etc., it shall be lawful for the plaintiff on or at any time after the third Saturday succeeding the return day, etc., to enter judgment by default, etc., unless the defendant shall previously file an affidavit of defense."

The defendant moved the court to take off the judgment, which was refused. He took a writ of error, and assigned for error the refusal to take off the judgment.

BANKS & WEIR, for plaintiff in error.

J. M. THOMPSON and STEWART & CLARK, for defendant in error.

AGNEW, J.

The court below erred in entering judgment for want of an affidavit of defense in this case. The plaintiff filed his declaration at the same time with the copy of the lease, thus giving notice to the defendants, of the nature of his claim. By the written agreement the defendants contracted to pay a rent of 15 cents per ton for all coal dug, mined and carried away, the amount thereof to be ascertained by the weighmaster's certificate of the weight. Had the claim been for a sum of money founded on a certain amount of coal dug and carried away, it would be difficult to maintain that the action was not upon an instrument of writing for the payment of money. The authorities would then support the right of the plaintiff to recover judgment for want of the

required affidavit of defense. The case of *Frank v. Maguire*, 6 Wright, 82, goes to this extent, and no further. But in the present case it is not pretended that a single ton of coal was dug and mined; and the plaintiff counts in his *narr.* for none. His breaches are assigned for a failure to perform any part of the agreement, and his declaration claims damages for the entire non-performance. Instead of averring that coal was dug, and how many tons, it alleges that the 8,000 tons were not dug and that no sufficient cause has been assigned by the defendants for not digging them; and, in short, the whole claim sounds in damages for non-performance of all the terms of the lease. The case, therefore, does not fall within the Act of Assembly requiring an affidavit of defense.

Johnston, Taylor & Co. v. Cowan, 9 P. F. Smith, 275, decided at the last term in this district, differs from the present case, and affords it no countenance. There the lease of the privilege for taking clay was at a minimum specific money rent of \$300, payable in semi-annual sums of \$150, whether the clay was dug or not; and it was for this minimum sum the plaintiff brought his action. The evident intent of the contract there was, that Johnston, Taylor & Co. should pay the minimum sum unconditionally, with the provision for more, if more clay should be dug and taken away than would, at the stipulated rate, amount to that sum; and Cowan, the plaintiff, claimed the \$300 only. That case is, therefore, no authority for this.

Judgment reversed, and the record remanded with a *procedendo*.

Reversed.

THE EUREKA COAL CO. v. BRAIDWOOD.

(72 Illinois, 625. Supreme Court, 1874.)

¹ **Evidence of condition of shaft.** In suit on contract for sinking a shaft, it appeared that the shaft was finished on the 20th of November. Evidence was offered by defendant to show the condition of the shaft in January following, the shaft meanwhile being full of water. *Held*, that the evidence was properly rejected.

¹ *No. 5 Mining Co. v. Bruce*, 3 M. R. 147.

Formal acceptance not necessary. If a shaft be sunk according to contract, it is the duty of the party procuring the work to accept it; and the party sinking can not be prejudiced by the neglect of a formal acceptance thereof.

Reasonable time for examination. Where work is to be accepted or rejected, the examination should be made when the work is tendered or within a reasonable time thereafter.

Appeal from the Circuit Court of Will County; the Hon. JOSIAH McROBERTS, Judge, presiding.

This was an action of covenant by James Braidwood, James Roe and James Reuncic, against the Eureka Coal Company.

Messrs. BARBER & MUNN, for the appellant.

Messrs. HILL & DIBELL, for the appellees.

Mr. Justice SCOTT delivered the opinion of the court.

This action is in covenant, on an agreement under seal. Appellees undertook to sink a shaft, for the purpose of mining coal, at a point to be selected by the company. Among other things, appellant obligated itself to furnish certain machinery, and to do it at such times as would not hinder the progress of the work, using due diligence in that regard. The shaft was to be sunk below the strata of coal, and to be left in good condition for mining. A general performance of all the undertakings on the part of the appellees is averred. Several breaches are then assigned, the principal one being, that in sinking the shaft a steam pump became necessary, to remove the water as the work progressed, and the company failing to furnish it in apt time, appellees were unnecessarily delayed, and thereby sustained great damages. The cause was submitted to a jury, who found the issues for appellees, and assessed their damages at \$3,990. To reverse the judgment entered on the verdict, the coal company prosecute this appeal. We see no reason for reversing the judgment for any cause of error suggested.

The evidence is flatly contradictory, and in all such cases, where the jury have been properly instructed, the verdict must stand unless it plainly appears it was the result of passion and prejudice.

The controverted point in the case was, whether appellees had completed the shaft according to the contract, and left it in good condition for mining coal. On this question a great number of witnesses were examined on both sides, all, or nearly all of them of large experience in this kind of work. The evidence is totally irreconcilable. It would justify a verdict either way. We can not undertake to say which set of witnesses the jury should believe. This would be to invade the province of the jury, which we have neither the right nor the inclination to do.

Appellees gave notice on the 20th of November, the shaft was completed, but appellant did not then examine it with a view of accepting or rejecting the work. One reason assigned is, it was full of water and the examination could not be made. As to whose fault it was the shaft was filled with water, the testimony is as conflicting as upon any other point. Appellees attribute it to the company's superintendent in removing the suction pipe used with the steam pump. Without it they could not keep the water down. There is evidence in the record, if the jury gave credence to it, that tends to support this theory of the case.

Conceding the fact as found by the jury, that appellees really completed the shaft and left it in good condition for mining coal, they could not be prejudiced by the fact there was no formal acceptance by the company. Many witnesses of large experience, whose judgment on such a question was entitled to respect, say the shaft was a good one and was capable of being worked; if so it was the duty of the company to accept and pay for it.

The court excluded testimony offered to prove the condition of the shaft in the month of January following. We see no error in this. Its condition at that time would not show what its condition was at the time appellees claim to have finished and tendered it to appellant. The company ought to have caused the examination to be made at once. There is evidence that tends to show it could have been made then had not the section pipe been removed. Appellees insist that they had no means of keeping the water down after its removal.

Inquiry as to its condition in the month of January would have involved an extended investigation whether permitting

water to stand in the shaft would not tend to injure or destroy it. The examination should have been made when appellees tendered the work to the company, or within a reasonable time thereafter, and the evidence was properly confined to its condition at that time.

We have carefully examined this entire record, and we fail to perceive any satisfactory reason for reversing the judgment. The case was fairly presented to the jury, and we can not say their conclusion is not warranted by the evidence, nor that the verdict does not do justice between the parties.

The judgment must be affirmed.

Judgment affirmed.

KOCH'S AND BALLIET'S APPEAL.

(93 Pennsylvania, 434. Supreme Court, 1880.)

¹ Lease of mine implies covenant to work with reasonable diligence.

Where a right to mine iron ore or other minerals is granted, in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into.

² Remedy at law for failure to work mines. Where lessees, or parties holding mines under implied covenant to work, have neglected and refused to work the mines with reasonable diligence, it is very clear that the owners have a complete and adequate remedy at law for the recovery of such damages as they may have sustained.

³ Damages allowed in equity, only as an incident. Where proper ground for equitable relief is laid and sustained, and jurisdiction has thus attached, courts of equity will proceed to award compensation or damages when they are incidental to such relief, but not otherwise.

Appeal from the Court of Common Pleas of Lehigh County.

Bill in equity filed by Benjamin Guth and others, heirs and administrators of Daniel A. Guth, deceased, against John

¹ *Sharp v. Wright*, 28 Beav. 150; *Post* LACHES; *Brainerd v. Arnold*, 27 Conn. 617, *Post* LEASE.

² *Wheatley v. Westminster Co.*, L. R. 9 Eq. 538, *Post* LEASE.

³ *Ackerman v. Hartley*, 1 M. R. 74.

Koch, Sr., Lewis B. Balliet, executor of Stephen Balliet, deceased, and Edward H. Balliet and others, heirs of said Stephen Balliet, deceased.

The bill alleged in substance:

1. That on August 23, 1842, Daniel A. Guth, since deceased, entered into an agreement with Christian Pretz and others as follows: "For the consideration hereinafter mentioned, the said party of the first part hereby covenants, grants and agrees, to and with the said parties of the second part, that he, the said party of the first part, will and does hereby grant, permit and allow the said parties of the second part, their heirs, executors, administrators and assigns, the exclusive right and privilege to open pits, sink shafts, mine, and make all necessary work for mining and for mining purposes, in or upon all or any part of all that tract or parcel of land owned by said party of the first part, situate in the township of South Whitehall aforesaid, for the purpose of digging and mining iron ore, and all other kinds of minerals and ores, and to mine, dig, take away from said land, sell, use and dispose of iron ore, and all other kinds of minerals and ores, the said parties of the second part, their workmen and laborers, to do as little damage to the land, wood growing thereon, and premises, as the nature and proper prosecution of the proposed undertakings will permit. In consideration whereof, the said parties of the second part, promise and agree to give and deliver to the said party of the first part, or to his heirs, executors, administrators or assigns, the one sixth part of all the iron ore, and of all other ores and minerals, which they, the said parties of the second part, their heirs, executors, administrators or assigns may move, dig, or cause to be moved or dug from, in or upon the said land, the one sixth part to be delivered at the mouth or mouths of the pit or pits free and clear of all expenses to him, the said party of the first part, his heirs and assigns. The remaining five sixths parts of all the aforesaid ores and minerals to belong to and be the property of the said parties of the second part, their heirs, executors, administrators and assigns. And the said party of the first part further agrees, that the parties of the second part, may if they deem necessary, erect one or more buildings for the accommodation of those employed in

the mines, upon said land, provided that if at any time the said parties of the second part, their executors, administrators or assigns shall finally abandon the working of said mines, the said party of the first part shall have the first chance to purchase such buildings, and if a price can not be agreed upon, then said building or buildings shall, at the expense of the said parties of the second part, their executors, administrators or assigns, be removed from said lands. And it is further agreed, that if limestone shall be mined or quarried upon said lands by the said parties of the second part, their executors, administrators or assigns, they may sell the same, paying one sixth part of the proceeds of sale to said party of the first part, his heirs or assigns."

2. That on the fifth of December, 1851, the parties of the second part in the above agreement, assigned and transferred to John Koch, Sr., and to Stephen Balliet, now deceased, all their rights and privileges under said contract.

3. That under and in pursuance of the aforesaid contract, and in carrying out its object—the mining and raising of iron ore and other ores and minerals—John Koch, Sr., and Stephen Balliet, and his legal representatives, built, erected and maintained extensive machinery and improvements, and sunk pits and shafts for mining purposes, and for thirty years or more, dug, mined, raised and disposed of large quantities of iron ore, paying to the persons entitled thereto, the one sixth part of said ores, averaging about \$3.500 annually.

4. That about the 1st of April, 1872, the respondents, without any cause, and in violation of the terms of the aforesaid contract, entirely ceased and abandoned the digging, mining and raising of iron ore, and other ores and minerals, upon the said premises, and the delivery of any portion thereof to complainants, and have persistently and without cause ever since said date, continued their abandonment, by reason whereof your orators are deprived of all income and rental from said lands.

5. That although repeated offers have been made by responsible parties to the respondents to work and operate the said mines on terms as favorable to the respondents as can reasonably be had, all such offers have been refused, and notwithstanding complainants have often requested and notified

the respondents to resume said mining operations, or surrender or rescind the aforesaid contract, they have refused, and still refuse, to comply. And your orators aver that they are informed, and believe, that respondents do not intend to carry out the purposes and intentions of the said contract.

6. And further, that there is on said described tract of land a large and valuable bed of iron ore, which can be profitably worked.

In consideration whereof, and as complainants can have no adequate remedy at law, they pray that the court may decree and direct "that the aforesaid respondents, within as reasonable time as to the court may seem meet and proper, shall proceed to dig, mine and raise iron and other minerals upon said land, and deliver the one sixth part thereof to complainants, according to the spirit and intent of the said contract or agreement; or, in default thereof, to cancel, rescind and deliver up the aforesaid contract or agreement."

The respondents demurred to the bill on the ground that the complainants had an adequate remedy at law.

The court overruled the demurrer, when respondents filed an answer which (1) admitted the first and second paragraphs of the bill to be substantially true, but averred that on the 2d of March, 1848, there was executed a supplemental agreement between Daniel A. Guth and C. Pretz, as agent and partner of the Guth Mining Company, wherein it was stipulated that as the mining company had built certain buildings on the lands, it was agreed that Guth should pay one half the taxes; that the company should pay Guth rent for the land on which the buildings were erected, and the gardens attached thereto; that if the ores should become exhausted, or the company at any time should see fit to surrender its lease, and the parties should fail to agree upon the price at which Guth should take said houses, that they should resort to a method of appraisement which was set forth in the agreement. And the answer averred that this supplemental agreement was included in the transfer alluded to in the second paragraph of the bill.

2. The answer admitted the mining and raising of iron ore by respondents' subtenants and lessees, mentioned in paragraph third of plaintiffs' bill, but they denied that they

worked said mine thirty years, and denied the sum of \$3,500 averaged annually.

3. It denied the matters alleged in paragraph four, and averred that respondents never abandoned the said mines, but leased the same to the Crane Iron Company in the year 1852, and the said company operated and worked the mines until 1872; that long before the expiration of the said lease, the respondents tried all means of an extension of said lease and to lease to other parties as set forth in the answer.

4. It denied generally the matters set forth in the fifth and sixth paragraphs of the plaintiffs' bill.

5 and 6. It denied the right of the plaintiffs to maintain their bill, and asked that it might be dismissed.

A general replication was filed, and the court referred the case to T. B. Metzger, Esq., as master, who took a large amount of testimony in support and denial of the allegations of the bill and answer, and then reported a decree dismissing the bill, on the ground that the complainants had an adequate remedy at law. Exceptions were filed by complainants, and after argument the court again referred the case to the master, "with instructions to entertain the complainants' bill, to consider and marshal the testimony, and report the findings of fact, as required by the rules of equity practice, to determine and assess the damages, and to report a form of decree."

The master filed a second report, wherein he found as follows:

"The facts proven in this case are these:

"1. The original writing between Daniel A. Guth and Christian Pretz et al.

"2. The assignment of this writing to Koch, Sr., and Stephen Balliet, now deceased, by Christian Pretz et al.

"3. The working of the Guth mines, in connection with the Koch and Balliet mines, by the Crane Iron Company, up to April, 1872, under lease from Balliet and Koch, for a term of twenty years.

"4. That the income of the Guth heirs was nearly if not quite \$3,500 a year; and that the yield of ore from their mines was, on an average, six thousand tons per year, of which the complainants were entitled to the sixth ton of mer-

chantable ore, delivered at the pit or pits, under the original writing between D. A. Guth and C. L. Pretz, George Probst et al.

“That the complainants have proved a refusal on the part of the respondents to extend this same lease, viz.: the lease of Crane Iron Company with Koch, senior, and Balliet, now deceased, some time before the original lease expired; but they have not proven the fact, that the respondents neglected, refused or were indifferent to a leasing of the same premises to parties other than the Crane Iron Company. On the contrary, it is established by indisputable testimony, that the respondents made diligent endeavor to lease these premises to others immediately after the expiration of the six months which the Crane Iron Company had for the removal of their machinery.

“The measure of damages would be the price of ore per ton from November, 1872, to the time of final decree.

“The testimony is, that the yield of ore would have continued the same. This being so, the Guth heirs would have been entitled, and would, in case this present finding of facts is not sustained, be entitled to one thousand tons per year at the prevailing prices, which were to be from \$3.50 to \$4.00 per ton. I can not fix this rate more accurately because no more accurate standard is fixed by the testimony. This disposes, I believe, of all questions, and complies fully with the directions of your honorable court.

“In view of these findings, I again respectfully submit the decree reported by me heretofore.”

Both complainants and respondents filed exceptions to this report. The court, LONGAKER, P. J., filed an opinion and made a decree: “That within thirty days from this date, the defendants pay unto the plaintiffs the sum of \$8,615.10 with interest from January 1, 1877; and that within the said period they proceed, with diligence and in a reasonable and proper manner, to prosecute the work of digging, mining and raising iron ore upon and from the premises in such quantities as the capacity of the mines and the quantity of ore upon the premises will warrant; and that they deliver to the complainants, at the pits’ mouths, the one sixth part of the ore so mined, free and clear of all expenses to the complainants. And that

in case of the failure or default on the part of the respondents to comply with and perform the directions of the foregoing decree in every particular, then, that within five days after the expiration of the aforesaid thirty days, the respondents rescind, cancel and deliver up to the complainants the contract or agreement."

From this decree the defendants took this appeal, alleging that the court erred in overruling the demurrer and in entering the above decree.

JOHN D. STILES and MORRIS L. KAUFFMAN, for appellant.

R. E. WRIGHT & SON and EDWARD HARVEY, for appellees.

STERRETT, J.

The agreement which forms the basis of claim in this case was made in August, 1842, by and between Daniel A. Guth, of the one part, whose interest therein is now represented by the appellees, plaintiffs below, and Christian Pretz and others, parties of the second part, to whose rights, duties and obligations the appellants succeeded by virtue of sundry assignments of the agreement, Guth, being then the owner of the land, covenanted and agreed with the "parties of the second part, their heirs, executors, administrators and assigns, to furnish and allow them * * * * * the exclusive right and privilege to dig, mine and take away all iron ore and all other minerals which are or may be found in or upon the land" described in the agreement; "and for that purpose to open pits, sink shafts, and to make and erect all necessary works for the purpose of digging and mining said ore and minerals and taking the same from said land, etc. In consideration whereof the parties of the second part covenanted and agreed "to deliver to the said party of the first part, or to his heirs or assigns, the one sixth part of all iron ore and of all other ores and minerals which they * * * may mine or dig, or cause to be mined or dug, in or upon said land. The said one sixth part to be delivered at the mouth or mouths of the pit or pits free and clear of all charges and expenses to the said party of the first part," etc. "It being agreed and understood by all the parties that the remaining five sixth part of all said ores and minerals shall belong to

and be the property of the said parties of the second part, their heirs, executors, administrators and assigns." This was followed by a supplemental agreement, made in March, 1848, by which it was provided that each party should pay one half of the taxes; that the grantees should pay a certain rent for land occupied by their houses, stables, etc.; and, in case the mines should become exhausted, or the grantees should "for any other cause see fit to surrender and give up their lease of said mines," provision is also made for valuing and disposing of the houses, stables, etc.

The bill charges, that in pursuance of the agreement, the mines had been successfully worked for many years and yielded a large income to the plaintiffs; that, on or about April 1, 1872, the defendants, "without any cause whatever, and in violation of the terms and spirit of the aforesaid contract and agreement, entirely ceased, suspended and abandoned, or caused to be suspended and abandoned, the digging, mining and raising of iron ore and other ores and minerals upon the said premises, * * * and have persistently, and without cause, ever since continued their abandonment and suspension of the mining, digging and raising of said iron ore and other minerals"; and then concludes with a prayer for a decree that the defendants shall, within a reasonable time, proceed to work the mines and deliver one sixth of the ores and other minerals mined to the plaintiff, according to the spirit and intent of the agreement, or, in default thereof, cancel, rescind and deliver up the contract, and for "such further relief in the premises as may seem agreeable to equity and good conscience."

The master very properly found that the mines had not been actually abandoned by the defendants, nor had anything been done that amounted to an abandonment, while it was shown that they had declined to extend the lease of the Crane Iron Company before it expired, and did not afterward work the mines themselves. The master finds that immediately after the expiration of that lease they made diligent but unsuccessful efforts to lease the mines, for the purpose of mining. They may, perhaps, have failed to comply with the terms of the agreement according to its true intent and meaning, but there was nothing done or omitted to be done, that would justify the

cancellation of the agreement. At most, they rendered themselves liable to damages for neglect to work or cause the mines to be worked. While the rights granted are without limit as to time, and the agreement contains no express covenant as to how the mines shall be worked, or that any specified amount of ore shall be taken out, it does not follow that the appellants were at liberty to operate the mines or not as they saw fit. It was evidently the intention of the parties that they should be worked with reasonable diligence, and that would depend largely on the circumstances, the quantity and quality of the ore, and the demand that existed from time to time, would necessarily enter more or less into the question of due diligence. If the ore proved to be abundant and of good quality, and the demand was such as to justify a vigorous prosecution of the work, the spirit of the agreement manifestly required that it should be so worked. Where a right to mine iron ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into. This principle appears to be recognized in *Watson v. O'Hern*, 6 Watts, 362, and *Lyon v. Miller*, 12 Harris, 392. In the former, a lease of a stone quarry in consideration that the lessee should pay a certain price per perch for all the stone taken out, was held to be a contract on his part that he would work the quarry, and, upon his failure to do so, the lessor might maintain covenant, and recover damages. It is there said, "If the defendants had any excuse, legal or equitable, from the responsibility thus assumed by their agreement, it lay upon them to show it. The plaintiff was not bound to prove the extent of their capacity to fulfill the contract. The lease presupposes they would work the quarry, and gives them the entire control over the premises, and, being themselves acquainted with their own business and concerns, they were better prepared to show the extent to which they were able to work it, or, if not worked at all, the reasons for their inability. Not having done so, it was for the jury to give such damages as they might deem a compensation for the loss of rent."

Assuming then that appellants neglected and refused to work the mines with reasonable diligence, it is very clear that the appellees had a complete and adequate remedy at law for the recovery of such damages as they may have sustained.

There was no allegation of fraud, accident or mistake in the procurement or execution of the agreement, nor was there anything alleged or shown that would justify a mandatory order on the appellants, requiring them to proceed and prosecute the work of mining within a specified time, on pain of forfeiting their rights under the agreement. Nor could it be justly claimed that by proceeding in equity a multiplicity of suits would be avoided. While the agreement remains in force, the right of action must necessarily depend on breaches of its provisions, and *non constat* that any will occur hereafter. The only claim that has been made and sustained with any degree of success is the demand for damages resulting from a breach of the agreement, and for that there was no doubt an adequate remedy at law. Where proper ground for equitable relief is laid and sustained, and jurisdiction has thus attached, courts of equity will proceed to award compensation or damages where they are incidental to such relief, but not otherwise. We think the conclusion reached by the master in both of his reports, that the bill should be dismissed, was correct.

Decree reversed and set aside, and it is now ordered and decreed that the bill be dismissed, and that the appellees pay the costs, including the costs of this appeal.

Reversed.

1. Covenant to pay royalty on proceeds of coal sold at pit's mouth construed *not* a covenant to pay on the value of all coal at the pit's mouth: *Gerrard v. Clifton*, 7 Term, 676.

2. Proper parties to action on covenant of warranty in deed to trustee: *Hartford Co. v. Miller*, 3 M. R. 353.

3. Covenant to deliver up mine in repair runs with the land: *Martyn v. Williams*, 1 H. & N. 817. Case of covenant to carry coals construed to run with land: *Hemmingway v. Fernandez*, 12 L. J. Ch. 130.

4. Covenant for leave to determine lease on notice is not an unusual or unreasonable covenant: *Kicketts v. Bell*, 1 De Gex & S. 335.

5. Covenant for royalty on ores carried, construed to include ores merely shunted (switched) on the defendant's line: *Great Western Co. v. Rous*, L. R. 4 H. L. 650.

6. The action follows the nature of the interest of the covenantees (rather than the form of the covenant), so that the action must be joint where the interest in the subject-matter is joint, and *vice versa*: *Mills v. Ladbroke*, 7 M. & G. 218; 7 Scott N. R. 1005.

REX V. BYKERDIKE.

(1 Moody & R. King's Bench, 1832.)

Conspiracy to prevent work. An indictment for conspiring "to prevent the workmen of J. G. from continuing to work" does not require evidence of conspiracy to prevent *all* the workmen from continuing to work.

Indictable offense. A combination of workmen for the purpose of dictating to masters what workmen they shall employ is indictable.

First count of the indictment charged that R. Byderdike, with divers others, etc., did conspire, combine, confederate, and agree unlawfully to intimidate, prejudice, and oppress one John Garforth in his trade and occupation, as agent for a certain colliery, to wit, etc., and to prevent the workmen of the said J. G. from continuing to work in the said colliery.

Second count laid a conspiracy to oppress and injure Joseph Jones and others, partners in a certain colliery, to wit, etc.; and to prevent the workmen in the employ of the said J. J. and others, his partners, from continuing to work at the said colliery, and compel the said J. J. and others, his partners, to discharge the said workmen in their employ.

Jones was an owner of the Fairbottom colliery; Garforth was agent for the colliery. Seven colliers had been summoned before a magistrate by Garforth for refusing to work. It appeared that this was done at their own request, as they were afraid to work except under the appearance of being compelled to do so.

The body of the other men met, having taken certain oaths, and agreed upon a letter addressed to Garforth, to the effect that all workmen in Garforth's employ would "strike in fourteen days unless the seven men were discharged from the colliery." The letter concluded, "By order of the board of directors for the body of coal miners, Fairbottom Colliery."

Dr. BROWNE, for the defendant, argued that the indictment must be understood as charging a conspiracy to procure all

the workmen to be discharged, which clearly was not supported by the facts. And that as to the earlier part of the indictment, the workmen were clearly justified in combining among themselves not to work since the late Act 6, G. 4, C. 120.

BRANDT and TOWNSHEND, for the prosecution, cited *R. v. Ferguson and Edge*, 2 Stark. N. P. 489; and *R. v. Horne*, Cowp. 680, showing that an allegation as to "the workmen," was supported by proof as to some of the workmen. And, as to the statute, they argued that it did not protect a combination for such a purpose as this, but only for obtaining higher wages, regulating time, etc.

PATTERSON, J., told the jury that a conspiracy to procure the discharge of any of the workmen would support the indictment, which did not necessarily lay the intent as to all the workmen; and, if it did, that it was still a question whether the facts would not have proved it as to all. Further, that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ; and that this compulsion was clearly illegal.

The defendant was convicted.

REX V. BATT ET AL.

(6 Carr. & P. 329. Old Bailey Sessions, 1834.)

Violence against laborers accepting under-rate wages. Every man has the right to work for the best price he can get; but if others choose to work for less than the usual price, the law will not permit violence to be used against them or those by whom they are employed.

Riot—"Beginning to demolish." A party of coal whippers, having malice against a coal lumper who paid less than the usual wages, created a mob, and riotously went to the inn where he kept his pay table, made threats against him, began to throw stones and break windows and partitions, and continued this mischief against the house after he himself had escaped. *Held*, that they might be convicted of "beginning to demolish" the house, if it was their intent to demolish it, even although their principal object was to injure the lumper.

Indictment for riotously assembling and beginning to demolish the house of one Liddiard.

From the evidence on the part of the prosecution, it appeared that the prosecutor kept a public house called the Silver Lion, and that a person named Miller, a coal lumper, had his pay table there; that, about half-past eight in the evening of the 3d of February, Miller was in the back kitchen of the house, with some money in a basin for the purpose of paying the coal whippers who were under his control; that the shout of a mob was heard, and a cry of, "Murder Miller and all the bloody lumpers!" Many large stones and brickbats, and a flat iron, were thrown at the house, and the mob rushed in. Miller got over the wall of a back yard and made his escape. It appeared that the men in the employ of Miller were in the habit of working for less wages than many others in the trade thought right. The prosecutor said he had no quarrel with the men, but that they had with Miller, and he had no doubt that they wished to wreak their vengeance on Miller, and, if he had not made his escape, would have murdered him. He added, that it was notorious that the pay table of Miller was at his house. A person who kept a public house more than half a mile from the Silver Lion, proved that he saw the mob, on the evening in question, near his house; that they broke his lamp, and he heard them say as they went off—"Away for Miller's, and pull the ——'s house down!" Miller did not live at the Silver Lion, but at some distance from it. The names of the prisoners were, Batt, Donoghue and Kipping. With respect to Kipping; it appeared, that just before the mob came up, he went to the Silver Lion, and asked for some beer, and said, "Where is bloody Miller?" And that when the mob came in, he pursued one of Miller's men into the back yard, and tried to seize him while he was escaping over a wall. Batt was proved to have been with the mob, and to have thrown stones several times at the house. Donoghue was with the mob before and after the attack upon the house, and pointed out to the mob one of Miller's men; and when he was taken two days after, being told it was for the disturbance at Stepney, said, "Is that all? I wish we had broke the ——'s bloody neck."

While the mob were engaged in throwing stones at the

house, a policeman ran in between them and the front of the house, and drawing his staff, told them to desist, adding that the first man he saw throwing any stone he would take him into custody or knock him down.

They then went away, and were met some distance off in a riotous and disorderly state, and rescued Kipping from a policeman who had just taken him into custody.

A surveyor proved that, in addition to the breaking of the windows in the front of the house, a sash in a door inside was broken to pieces, and one panel in a door, and another in a partition, were broken quite out. The partition itself was much injured and a wall in the back yard was also broken down.

C. PHILLIPS, for the prisoners, submitted that the case did not come up under the statute. The jury must be satisfied that the intent was finally to demolish the house, and it was plainly proved, that in the present case, the object was to do some injury to Miller, as there was a search made for him in the back yard. He also read Mr. Justice Littledale's opinion in the case of *Rex v. Thomas*, 4 Carr. & P. 238; and submitted that there was scarcely any difference between that case and the present.

GURNEY, B. I think there is a very important distinction; I do not differ from Mr. Justice Littledale's opinion.

GURNEY, B. (afterward in summing up) said: This indictment charges the prisoners with the offense, that they, together with several other persons, riotously assembled; and, being so riotously assembled, they riotously began to demolish the house of the prosecutor Liddiard. The prisoners were coal whippers; and there seems to have been some discontent and dissatisfaction on account of a difference in the wages taken by some of that body.

Every man has a right to work for the best price he can get; but, if others choose to work for less than the usual prices, the law will not permit that violence should be committed toward them, or toward those by whom they are employed or those with whom they are connected. The prosecutor says: he does not think that the mob had any animosity against

her; but they had some ill-will against Miller; and if in the execution of one purpose, they extend their purpose, and do two mischiefs instead of one, they must take the consequences. If this indictment had been differently framed it might have been sustained. If the indictment had been for breaking and entering the dwelling house in the night-time, with intent to commit a felony, then it might, I think, have been sustained against those of the mob who broke into the house. His lordship read the evidence through, and then observed: It does not follow that, because their object was to murder Miller, they had not a further object to demolish the house, which is to be judged of from what they did, and the interruption they met with. A surveyor has proved the damage done and no doubt the damage is sufficient, provided you are of opinion that the demolition of the house was the object of the mob

The first question is, whether there was a riotous assembly? There can be no doubt of that. Then, if so, what was the object of the parties? The mob say, "Away, for Miller's!" but they do not go there, but to the White Lion; and the account of the transaction there seems to begin thus: Kipping asked for beer and used an expression of ill-will against Miller. But though he did so, yet there is no evidence that he was seen with the mob before this, but only afterward. He was in the house before the mob came. And if his was a separate object of vengeance against Miller, he will not be guilty on this indictment. There is no evidence as to Donoghue of his having done anything at the house. He was in the mob both before and after. Now as to the offense itself; a mob's going along and breaking a person's windows is not a beginning to demolish, even though the frames of the windows should be broken, because the object of the mob in such a case is evidently very different. But here there is a purpose of violence against Miller, and a purpose of pulling down *his* house. The mob, however, do not go to Miller's, but to the White Lion, and when they get there, it seems that they began to throw stones and brickbats. In the case cited, of *Rex v. Thomas*, there was nothing to prevent their going on; and in favor of life, it was inferred that, as they left off voluntarily they never had any intention of proceeding further. But, certainly, that is not so here; because there is the

interference of the police, and it was after the threats of the police that the mob desisted. If you are of opinion that this mob began to do mischief to the house, intending to persist in demolishing it, if they were not interrupted, either on account of Miller's having his pay table there, or of the men working at lower prices using the house, the offense charged will have been committed; and it should be promulgated that each and every one in the mob is guilty of the offense committed. Every one can not do the same thing, but if they are there for one common purpose, they are answerable. If you are of opinion that there was no beginning to demolish the house, then you will find the prisoners not guilty. The mob might have two purposes, and if one of those two purposes was to demolish the house, there was a sufficient beginning to demolish to support the indictment. As to the three prisoners, you will say how many of them were with the mob for the common purpose.

Verdict of guilty against all the prisoners.

ADOLPHUS, for the prosecution.

C. PHILLIPS, for the prisoners.

REX V. WEBB AND MOYLE.

(1 Moody Crown Cases, 431. A. D. 1835.)

Larceny—Taking ore from fellow miners' heaps. It is not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owners.

The prisoners were tried before Mr. Justice PATTESON, at the Spring Assizes for Cornwall, 1835, and found guilty.

The indictment charged them with stealing 100 lbs. weight of copper ore, the property of Stephen Davey and others. It appeared in evidence that Stephen Davey and others were the adventurers in a mine called the Consolidated mine.

The prisoners and two others were tributers in their mine, but not adventurers. The prosecutors of the indictment were Cornish, and three others, who were also tributers in the mine, but not adventurers. It appeared that tributers (generally in companies of four) take from the adventurers a certain number of yards in the mine, called a pitch, from which they dig out ore and throw into a heap or pile in some level, whence they convey it along the level to a shaft and so up to the surface. There it is taken by the adventurers, and the tributers do not interfere further.

The tributers are paid according to their agreement, so much in the pound on the selling price of the ore; where it is very good, they receive a smaller sum than where it is inferior, because the quantity of labor (which is what they contribute) produces a more valuable commodity in the one case than in the other. The prosecutors' pitch contained better ore than the prisoners'. The prosecutors received 2*s.* 4*d.* in the pound from the adventurers; the prisoners, 5*s.* 6*d.*

It was proved satisfactorily that the prisoners had taken a large quantity of ore from the prosecutors' pile and added it to their own

HALCOMB, for the prisoners, contended, 1st, that the property was not correctly laid; for that whether the ore belonged partly to the adventurers and partly to the tributers, (as the captain of the mine had stated in his evidence,) or to the adventurers only, yet they were not partners or a joint stock company, or joint tenants, or tenants in common, within the stat. 7 G. 4, c. 64, s. 14.

The learned Judge thought there was nothing in this objection; but as he reserved the second point, he mentioned this also: 2d. That by taking ore out of one pile and putting it in another, the prisoners did not steal from the adventurers, for both piles remain in the possession of the adventurers, if the tributers be but servants; and if the tributers be tenants in common, still, as both piles were intended to come, and ultimately would come, into the hands of the adventurers, there could be no stealing from them.

ROGERS, for the prosecutors, answered, that the adventurers

were cheated, for they would have to pay 5*s.* 6*d.* in the pound on the ore removed to the prisoners' pile, whereas if it had remained in the prosecutors' pile, they would pay only 2*s.* 4*d.* in the pound; and besides that, the unauthorized removal of the ore from the prosecutors' pile by the prisoners, with a fraudulent intention to appropriate it to their own benefit, constituted a larceny the moment it was removed, which could not be cured by returning it in any way to the adventurers.

The learned judge was of opinion that the property was correctly laid, and a larceny proved; but reserved the latter point, and requested the opinion of the judges on both points.

In Easter Term, 1835, this case was considered by Lord DENMAN, C. J., TINDAL, C. J., PARK, J., LITLEDALE, J., GASELEE, J., BOSANQUET, J., ALDERSON, B., WILLIAMS, J., PATTESON, J., and they held the conviction wrong; PATTESON, J., dissented. * * The conviction was held wrong on the second point.

REGINA V. JAMES ET AL.

(8 Carr. & P. 131. Court of Exchequer, Crown Side, 1837.)

Closing airway under master's orders. Workmen stopping up an airway into an adjoining colliery, by order of their employer claiming the ownership and the right to close it, are not liable under the statute for malicious mischief; otherwise would be the case of doing an act *malum in se*, in which case the order would be no justification.

Indictment on the statute, 7 & 8 Geo. 4, c. 30, s. 6, for obstructing the airway of a mine.

The first count of the indictment charged that the prisoners, on, etc., at, etc., "feloniously and maliciously did obstruct a certain airway of and belonging to a certain mine of W. F. H. Phelps, by feloniously building a wall across the said airway," and by destroying a fire-place, with intent to hinder and delay the working of the mine. Second count—the like, not

setting out the means by which the airway was obstructed. Third and fourth—the like, stating it to be a level instead of an airway.

It was opened by LUDLOW, Serjt., for the prosecution, that Mr. Phelps had taken a lease of a colliery called the Waterloo Colliery, of Mr. Hall, the late member of Parliament for the Monmouthshire boroughs, and present member of Parliament for Mary-le-bone; this colliery being adjacent to a colliery of Mr. Protheroe's, who was largely interested in mine property.

The two collieries, though adjacent, were not connected with each other; and belonging to Mr. Phelps' mine, which ran more than a mile underground, was an airway.

In the coal mines there was a gas or vapor called the choke-damp, which was fatal to animal life, and to guard against the effects of this, various contrivances had been resorted to. In the mine of Mr. Phelps a long airway was constructed with a large fire near the end of it, and beyond that a pit called an air-pit; the effect of the fire being to create a strong draught of air, and thus draw off the choke-damp out of the mine; there being also side doors to close all the openings which led into other workings in the mines. Things were in this state till the 26th of May last, when the prisoners, headed by the prisoner James, who was a principal person in Mr. Protheroe's colliery, proceeded to the place and pulled down the side doors and fire-grate, and also took down the side doors and built a wall across the airway. The effects of this would be to drive back the choke-damp into Mr. Phelps' mine, and prevent the working. It might be that the defendants would set up that they had had the order of Mr. Protheroe for doing as they have done. Still an order to do wrong would afford no ground of defense; and though Mr. Protheroe might have a motive in stopping the works of a rival colliery, yet a person of his well-known respectability ought not to encourage a transaction of this sort, which might not only lead to collision among the people employed in the different works, but might also cause a very serious loss of life by means of the choke-damp.

LORD ABINGER, C. B.—If a servant did this by his master's

order, and supposing *bona fide* that the master had a right to order it to be done, would it not be too much to say that the servant is answerable as a felon for doing the thing maliciously when the malice, if there is any, is his master's, and not his own?

LUDLOW, Serjt.—Suppose that a master ordered his servant to shoot a man, that would be no excuse for the servant if he did it.

LORD ABINGER, C. B.—That is an act which is *malum in se*. But if a master, having a doubt, or no doubt, of his own rights, sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable in an action of trespass, but it would not be felony in the servants. The rules respecting acts *mala in se* do not apply. If a master told his servant to shoot a man, he would know that that was an order he ought to disobey.

But if the servant *bona fide* did these acts, I think they do not amount to an offense within this statute. If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so acting *bona fide*, I am of opinion that that is not a felony in them, even if in so doing they obstruct the airway of a mine.

What I find is this, that if these men acted *bona fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this act of Parliament. But if either of these men knew that it was a malicious act on the part of his master, I think then that he would be guilty of the offense charged.

LUDLOW, Serjt.—I shall show that the act done by the prisoners could only have the effect of stopping the working of Mr. Phelps' mine, and of giving Mr. Protheroe the monopoly of the coal, and I submit that that would bring the case within the statute.

LORD ABINGER, C. B.—I will hear your evidence.

On the part of the prosecution Mr. Llewellyn was called. He stated that he was the agent of Mr. B. Hall, under whom both Mr. Protheroe and Mr. Phelps held leases of their mines,

and that on the 25th of April he told Mr. Protheroe, Jr., and Mr. James, not to intermeddle with the airway, when the former stated that he would take no further step without writing to his father, and Mr. James added that he felt sure that Mr. Protheroe had a right to the airway.

LORD ABINGER, C. B.—I am now satisfied that this is not a case of felony.

These parties were disputing the right to this place, and may all be liable in trespass, but still I think it is no felony. I do not decide the right—far from it.

The prisoners must be acquitted.

C. PHILLIPS, for the prisoners.—Mr. Protheroe conceives that he has the right; he asserted, and is prepared to try it.

Verdict—Not guilty.

REGINA V. BARRETT.

(2 Carr. & K. 343. Queen's Bench, 1846.)

Indictment for ¹manslaughter must allege duty and breach. Where an engineer who had charge of an engine, which was worked for the purpose of keeping up a supply of pure air in a mine, neglected his duty so that the engine stopped and the mine thereby became charged with foul air, which afterward exploded and killed one of the miners. *Held*, that such engineer could not be convicted of manslaughter on an indictment which did not allege a duty in him which he had neglected to perform.

MANSLAUGHTER.—The indictment charged, that before and at the time, etc., the prisoner was in the employ of W. S. and others at their colliery, and was then and there employed to superintend and keep in motion the working of an engine at the said colliery, for pumping out the water from the underground workings of the said colliery, and thereby keeping a clear and free course for the passage of atmospheric air through, and the dispersing of foul air and noxious gases,

¹ *Regina v. Haines*, 4 M. R. 174; *Reg. v. Allen*, 7 Carr. & P. 153.

and especially a destructive, etc., gas, called carburetted hydrogen gas, which, in the absence of such free and clear passage of atmospheric air, would accumulate and become of great volume and quantity in the said colliery. It then charged that the prisoner in and upon one T. H., feloniously made an assault, and that the prisoner, on, etc., and for two days before, at, etc., did feloniously absent himself from the said colliery, and did feloniously neglect and refuse to superintend and keep in motion the working of the said engine, and did thereby feloniously prevent a clear and free course being left for the passage of atmospheric air through the said workings. And did cause foul and noxious gases, and especially carburetted hydrogen gas, to accumulate and increase in the workings of the said colliery, and that the prisoner did feloniously cause and occasion divers large quantities and volumes of carburetted hydrogen and other noxious and inflammable gases, which had accumulated and increased in the said colliery, to surround and be near to and about the said T. H., then and there being a collier employed in the said colliery, and then and there using a lighted candle in the same, and did then and there feloniously cause the said carburetted hydrogen and other gases, by then and there being so feloniously caused to surround and be near to and about the said T. H., then and there instantly and with great violence to become ignited and explode, and then and there to burn, bruise and wound him, the said T. H., thereby giving him, on the face, etc., divers mortal wounds, etc., of which he languished and died.

There were two other counts in the indictment, in which many of the allegations contained in the first count were omitted; but each of which laid the same cause of death, and charged it as having occurred in the same way as the first count.

The facts of the case, as opened by the counsel for the prosecution, appeared to be as follows: The deceased had worked in a coal mine, which was at a short distance from an old coal mine which had ceased to be worked, and, between the two mines there was a passage for the admission of air into the new mine. In the old coal mine there was an engine which was used for the purpose of pumping the water out of that

mine, in order that the passage between the two mines might be kept free; and the prisoner, who was an engineer, had been employed to work this engine. The prisoner had absented himself from his duty for three days, during which time the engine did not work; and the consequence of this was, that the water collected in and prevented the air from circulating through the passage between the two mines, thereby occasioning an accumulation of foul air, as charged in the indictment. While things were in this state, the deceased entered the mine with a lighted candle, whereupon the foul air exploded, and he received the injuries of which he died.

BRANDT and HULTON, for the prosecution.

MONK, for the prisoner.—These facts, if proved, do not amount to an indictable offense. All they show is, that the prisoner was guilty of a breach of a civil contract. The charge in the indictment amounts to no more than a mere non-feasance—it discloses no act of misfeasance. But acts of mere non-feasance do not make a man criminally liable, except in cases where he omits to discharge a duty imposed upon him by law, as for example, the duty of a parent to support his child.

In all other cases there must be, in order to support a criminal charge, some act done, not the mere omission or neglect to do an act; and he cited *Rex v. Green*, 7 C. & P. 156, where it was held, that, to make the captain of a steam vessel guilty of manslaughter in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain, and that a mere omission on his part to do the whole of his duty, is not sufficient for that purpose.

WIGHTMAN, J., was of opinion that the facts as charged did not constitute an indictable offense, observing that the indictment contained no direct allegation that it was the duty of the prisoner to do that which he was alleged to have neglected to do. And accordingly the prisoner was acquitted.

REGINA V. HAINES.

(2 Carr. & K. 368. Queen's Bench, 1847.)

¹ **Manslaughter, by negligence.** If it be the duty of a person as ground bailiff of a mine, to cause the mine to be properly ventilated by causing air headings to be put up where necessary, and by reason of his omission in this respect another be killed by an explosion of fire damp, such person is guilty of manslaughter, if by such his omission, he was guilty of a want of ordinary and reasonable precaution; and if it was his plain and ordinary duty to have caused an air heading to have been made, and a man using ordinary diligence would have done it.

Other parties negligent at same time. It is no defense in a case of manslaughter that the death was caused by the negligence of others as well as of that of the prisoner. In such a case the prisoner and the other parties are all guilty of manslaughter.

² **MANSLAUGHTER.**—The first count of the indictment stated that the prisoner, in and upon on James Shakespeare did make an assault; and that it was the duty of the prisoner to ventilate and cause to be ventilated a certain coal mine, and to cause it to be kept free from noxious gases, and that the prisoner feloniously omitted to cause the mine to be kept ventilated, and that the noxious gases accumulated and exploded, whereby the said J. S., who was lawfully in the said mine, was killed.

¹ *Reg. v. Barrett*, 4 M. R. 171.

² The indictment was in the following form:

WORCESTERSHIRE, }
 To wit: } The jurors for our lady, the Queen, upon their oath, present that Thomas Haines, late of, etc., on the 17th day of November, A. D. 1846, at, etc., in and upon one James Shakespeare, in the fear of God and of our said lady, the Queen, then and there being, feloniously did make an assault; and that before and on the said 17th day of November, in the year aforesaid, and at the parish aforesaid, in the county aforesaid, it became and was the duty of the said T. H. properly to ventilate, and to cause and procure to be properly ventilated, a certain coal mine there situate, called Round Green Colliery, and also to keep and cause to be kept the said mine sufficiently free and clear of and from fire-damp, and all noxious and sulphurous exhalations, gases and vapors, and also to keep and cause to be kept the said mine fit and safe for persons to work therein. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said T. H. then and there being wholly unmindful of his duty in this behalf, on the day and year aforesaid, and during the time aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did omit and neglect properly to ventilate or cause or procure to be properly ventilated the said mine, and

It appeared that a mine called Round Green Colliery, situate at Hale's Owen, was the property of George Parker, Esq., and that the prisoner was a sort of manager of it, and called the ground bailiff; that another person was under him called the butty, he being a sort of foreman, and that the deceased, who was called the doggy, was a kind of second foreman under the butty.

It further appeared, that, at about half past six o'clock on the morning of the 17th of November, 1846, a number of

did also then and there, and during the time aforesaid feloniously omit and neglect to keep or cause to be kept the said mine sufficiently free and clear of and from fire-damp and noxious and sulphurous exhalations, gases and vapors; and also, during the time aforesaid, did then and there feloniously omit and neglect to keep or cause to be kept the said mine fit and safe for persons to work therein. By means of which said several premises, and of the said felonious omissions and neglects by the said Thomas Haines aforesaid, divers large quantities of fire-damp and other noxious and sulphurous exhalations, gases and vapors, did, on the said 17th day of November, in the year aforesaid, at the parish aforesaid, in the county aforesaid, in the said mine there accumulate, and did then and there ignite and explode. By means of which said ignition and explosion, caused and occasioned as aforesaid, the said J. S., then lawfully being in the said mine, was then and there suffocated and burned, of which said suffocation and burning the said J. S. then and there died. And the jurors, etc., do say, that the said T. H., him, the said J. S., in manner and form aforesaid, feloniously did kill and slay, against the peace of our lady, the Queen, her crown and dignity.

SECOND COUNT.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. H., on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in and upon the said J. S., in the peace, etc., then and there being, feloniously did make an assault; and that it then and there became and was the duty of the said T. H. to ventilate a certain coal mine there situate, called Round Green Colliery, and to render the same fit and safe for persons to work therein. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said T. H., well knowing that persons were then and there employed in the said mine, in the working thereof, and being wholly unmindful of his duty, did then and there feloniously omit and neglect to ventilate the said mine, or to render the same fit and safe for persons to work therein. By means whereof certain gases, exhalations, vapors, and foul air, which had then and there accumulated in the said mine, did then and there ignite and explode. By means of which said ignition and explosion the said J. S., then and there being a person lawfully employed in the said mine, was then and there suffocated and burnt, of which said suffocation and burning the said J. S., then and there, in the said mine, died; and so the jurors, etc., do say, etc., (concluding as in the first count.)

men were working in a large chamber in the colliery, when there was an explosion of fire-damp, by which nineteen persons, including the deceased, James Shakespeare, were killed; and it was imputed on the part of the prosecution, that this explosion would have been prevented if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. But it was sought to be shown by the cross-examination of the witnesses for the prosecution, that it was the duty of the butty (who was one of the persons killed by the explosion) to have reported to the prisoner as ground bailiff that an air-heading was required; and that, as far as appeared, he had not done so.'

HUDDLESTON and HOOPER, for the prosecution.

ALLEN, Serjt. (WHITMORE with him), for the prisoner, submitted first, that the prisoner was not guilty of any negligence at all, as it was only his duty to cause air-headings to be put up on the requisition of the butty; and secondly, that a person who was guilty only of breach of duty by omission, could not be found guilty of manslaughter; for that, in order to constitute that offense, there must be some wrongful or improper act done by the prisoner, except in those cases where there was a liability known to the law, such as providing an infant with food, or the like. He cited the case *Regina v. Allen*, 7 C. & P. 153.

MAULE, J. (in summing up).—The prisoner is charged with manslaughter, and it is imputed, that, in consequence of his omission to do his duty, a person named Shakespeare lost his life. It appears that the prisoner acted as ground bailiff of a mine, and that, as such, his duty was to regulate the ventilation, and direct where air-headings should be placed; and the questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of

manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect. Still, assuming that to be so, their neglect will not excuse the prisoner; for, if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter, and it is no defense for one who was negligent to say that another was negligent also, and thus, as it were, try to divide the negligence among them.

Verdict—Not guilty.

REGINA V. BLEASDALE.

(2 Carr. & K. 765. Queen's Bench, 1848.)

Crime committed through second party. If a man, by means of an innocent agent, do an act which amounts to felony, the employer and not the agent is accountable for that act.

Stealing coal from many owners by secret mining through common shaft. Where a prisoner was indicted in one count for stealing from the mine of one G., coal, the property of said G., and in the same count for stealing from the mines of thirty other proprietors, and it appeared that all the coal so alleged to have been stolen had been raised at one shaft, it was *Held*, 1. That the prosecutor could not be called upon to elect on which charge he would go to the jury. 2. That although for the sake of convenience in trying the prisoner, the judge might direct the jury to confine their attention to one particular charge, yet that the prosecutor was entitled to give evidence in support of all the charges laid in the indictment. 3. That proof of each aided the other on the question of felonious intent.

The prisoner was indicted under 7 and 8 Geo. IV., c. 10, s. 37, for stealing from the mine of one Henry John Gunning, coal, the property of the said H. J. Gunning; and in the same count, he was charged with stealing from the mines of thirty other proprietors, other coal, the property of each of such proprietors. There were also counts charging him with the severing of coal with intent to steal, and with common larceny; and in each count the coal was charged as being the property of the said H. J. Gunning; and also as being the property of the said thirty other separate and distinct owners.

It appeared that the prisoner had been the lessee, under

Captain Walmsley, of a coal mine at Wigan, in the county of Lancaster, which he had been working from November, 1842, till January, 1848; and

J. POLLOCK, for the prosecution, in opening the case, stated that the prisoner had, from the shaft opened to work this mine, carried on extensive workings of coal by means of levels, drift-ways, tunnels, cuttings and drains, and that, by means of these workings, he had gotten coal belonging to about forty different proprietors, without their sanction or knowledge, and in doing so had undermined part of the yard of the parish church, 144 yards of the main street of Wigan, and 220 private houses; and that he had thus unlawfully possessed himself of £10,000 worth of the coal of other persons.

JAMES (MONK with him), for the prisoner.—I submit that it is not competent for the counsel for the prosecution to proceed, under this indictment, for felonies so entirely distinct. Each separate severance and removal of coal is a separate and distinct felony. One of such felonies may, according to the opening, have been committed upwards of four years before another of them—may have been effected by means of different workmen, and under the superintendence of different agents. Each severance and removal of coal being a felony, there are, in fact, thirty-one distinct felonies charged in each count; and, if no restraint be put on the prosecution, there will be laid before the jury, under this indictment, and the prisoner will have to answer, evidence relating to many thousands of separate felonies.

The hardship on the prisoner is manifest. What would be an unanswerable defense to one charge, may be wholly inapplicable to another, and every defense may require, for proof, a different set of witnesses. How can the prisoner be expected to explain all these separate transactions on one trial? or how, if evidence to answer each particular act of trespass be called, can its application be shown, and its effect made intelligible to the jury? This case is distinguishable from *Rex v. Ellis*, 6 B. and C. 145. He cited *Rex v. Birdseye*, 4 Carr. and P. 386.

J. POLLOCK, *contra*, was stopped by

ERLE, J.—The question is, what, in such a case as this, is

one entire transaction? It may be that the making a level, a tunnel, a drain and a cutting, may all be necessary in order to take particular coal; if so, all would, I think, be part of one transaction, and might properly be given in evidence. I can not interfere at present.

The evidence for the prosecution was then given. It extended to all the operations mentioned in the opening of the case; to the getting of coal continuously during a period of upwards of four years; to operations conducted by different underlookers and by many workmen, and to coals taken from the coal-fields of thirty or forty different owners. On the case for the prosecution being closed:

JAMES applied to know upon which charge the counsel for the prosecution would elect to go to the jury.

J. POLLOCK having declined to elect, unless directed by his Lordship so to do.

ERLE, J., said: I will not so direct; but, for convenience' sake, Mr. JAMES may address himself to the charge of stealing the coal taken under the church yard. The whole workings may be relied on to show the felonious intent, though they go into twenty different counties.

MONK.—And into the separate properties of twenty different persons?

ERLE, J.—Yes.

MONK.—And extend over fifteen or twenty years?

ERLE, J.—Yes; if the mining operations be continuous for that time.

JAMES having addressed the jury.

ERLE, J., in summing up, said: The remarkable part of this case is the extent of the property taken; and it had been urged that the taking of each day was a separate felony, and that only one felony could be inquired into by you on this indictment. But, I should say, that as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people. As, however, complaint was made by the counsel for the prisoner, I have thought it better that your attention should be confined to the charge of taking the coal of one owner. But, in order to show that, when the prisoner took the coal of Mr. Gunning in No.

10 drift, he knew he was out of his boundary, I have permitted it to be proved that he has gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal. The prisoner did not, by his own hand, pick or remove the coal; but if a man does, by means of an innocent agent, an act which amounts to a felony, the employer, and not the innocent agent, is the person accountable for that act.

The prisoner was convicted.

REGINA V. LOWE.

(4 Cox's Criminal Cases, 449. Queen's Bench, 1850.)

An act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter.

Manslaughter—Deserting the engine. Where a man appointed to superintend a steam engine in a colliery for the purpose of raising colliers from the pits left the engine in the charge of an incompetent person, in consequence of which one of the colliers was thrown down the shaft and killed. *Held*, that the man so leaving the engine was guilty of manslaughter.

The prisoner was indicted for the manslaughter of Thomas Tibetts, on the 3d of June, 1850.

From the evidence in support of the charge, it appeared that the deceased was a collier, working in coal pits, and the prisoner was employed by Messrs. Jones and Darly, the owners of the pits, to attend the steam engine by which the "skip," or basket, was raised up or let down the shaft of the pit with the workmen, on their way from and to their work. In the case of the men ascending the pit, it was the prisoner's duty to set the engine in motion, to raise the skip until it reached about two feet above the surface or mouth of the pit, and then to stop the engine so as to allow a "wagon" or platform to be moved over the mouth of the pit, and enable the men to get out of the skip with safety.

The prisoner, instead of attending at the engine, as was his duty, left it on the morning of the 3d of June, 1850, in the care of John Stockley, a lad fifteen years of age. Stockley re-

monstrated with the prisoner at the time, and told him that he, Stockley, would not work the skip. The prisoner replied that the witness was too idle to work it, but he would make him. The prisoner then went away to a public-house.

During his absence the deceased (having descended the pit early in the morning), made the usual signal for the skip to be drawn up, by calling out to the boy stationed at the top of the shaft, whose duty it was in his turn to repeat the signal to the person having charge of the engine. In this instance the boy repeated the signal as usual, and Stockley set the engine to work, but failed in stopping it at the proper time when the skip reached the surface with the deceased and his fellow workmen. The failure was proved to be because "the skipper did not knock the engine up into the cap," Stockley stating that he did not know how to do it. The consequence was that the skip was drawn up to the pulley over which the rope connecting the skip with the engine passed, and the deceased forced out, falling down the shaft, which was one hundred and seventy yards deep, and was of course killed.

At the close of the case for the prosecution,

HUDDLESTON, for the prisoner, said he would take his lordship's opinion as to whether the facts, as proved, constituted the crime of manslaughter, or, in other words, whether a man whose duty it is to attend at a particular place or fill a particular office, and omits to attend, and leaves an incompetent person in his place, and death ensues, is guilty of manslaughter? In *Rex v. Allen and Clarke*, 7 C. & P. 153, it was held that where a sailing vessel was run down by a steamboat in consequence of the improper steerage of the latter, arising from there not being a man at the bow to keep a lookout at the time of the accident, neither the captain nor pilot could be convicted of the manslaughter of a person in the vessel run down. PARKE, J., then observed—"Supposing the captain had put a man at the proper part of the vessel and gone to lie down, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make anything of it. And ALDERSON, B., said to the jury: 'There is no act of personal misconduct or personal negligence on the part of these persons at the bar.' A distinction appears to be taken between those cases where

case or trespass would be, respectively, the civil remedy. In *Rex v. Green*, 7 C. & P. 156, also, it was held that to make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient.

“No doubt seems to have been expressed that, supposing the captain had gone down to bed and the accident happened, that he could not have been responsible. In the present case the prisoner had gone away to a public-house.”

W. H. COOK and E. V. RICHARDS, for the prosecution.

HUDDLESTON, for the prisoner.

LORD CAMPBELL, C. J.—I am clearly of opinion that an act of omission, as well as of commission, may be so criminal as to be the subject of an indictment, and that there is evidence to go to the jury of such a criminal omission in this case.

HUDDLESTON then addressed the jury on the question whether there was gross negligence, or, even if there was, whether the death of the deceased was caused by it.

Verdict, Guilty.

REGINA V. HUGHES.

(1 Dearsly & Bell, 248. Court of Criminal Appeal, 1857.)

¹ **Manslaughter, through neglect.** Deceased, with others, was walling a shaft in a colliery. It was the duty of the prisoner to place a stage on the mouth of the shaft, and the death was the direct consequence of his negligent omission to perform such duty. *Held*, that defendant was rightly convicted of manslaughter.

Elements of manslaughter, through negligence. That which constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence.

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by

¹*Reg. v. Haines*, 4 M. R. 174; *Reg. v. Lowe*, 4 M. R. 180.

WATSON, B.

This prisoner was tried before me at the last Swansea Assizes on February 25, 1857, on an indictment for manslaughter.

It was proved that some contractors were employed to wall the inside of a new shaft, which was sinking, in a colliery called the Tylecock Colliery. The deceased, with others, was working at the wall on a stage in the shaft. The prisoner was banksman at the top of the shaft, where there was an engine and rope to send down bricks and materials in a bucket, and draw up the empty buckets. It was his duty to send down materials, and to superintend the proper letting down of the buckets, and to place the stage hereinafter mentioned. The buckets were run down on a truck on to a movable stage over half the area of the top of the shaft, and there the bucket was attached and lowered down, the stage being withdrawn.

The prisoner on the occasion in question had omitted to put or cause to be put, the stage on the mouth of the shaft. In the absence of the stage a bucket with a truck and bricks ran along the tram-road into the shaft, and fell down the pit and killed the deceased. It did not appear that the prisoner was directing or driving the wagon at the time. I left it to the jury whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of commission or omission. They found that the death of deceased arose from negligent omission on the part of the prisoner in not putting the stage on the mouth of the shaft. Thereupon I directed a verdict of guilty. I did not pass sentence: I released the prisoner on bail until the opinion of the Court of Criminal Appeal should be taken.

May 23, 1857.

W. H. WATSON.

This case was considered on 30th May, 1857, by Lord CAMPBELL, C. J., ERLE, J., WILLIAMS, J., CROWDER, J., and BRAMWELL, B.

No counsel appeared.

Cur. adv. vult.

The judgment of the court was delivered on 18th June, 1857, by Lord CAMPBELL, C. J.

We are of opinion that this conviction ought to be affirmed. It was the duty of the prisoner to place the stage on the mouth of the shaft; the death of the deceased was the direct consequence of the omission of the prisoner to perform his duty: if the prisoner of malice aforethought, and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer his duty: *R. v. Edwards*, 8 Car. & P. 611; *R. v. Sarah Goodwin*, 1 Russ. C. C. 563, n. 3d. ed. But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter.

It has been held that to make the captain of a vessel guilty of manslaughter in causing a person to be drowned by running down a boat, proof of a mere omission on his part to do the whole of his duty is not sufficient: *R. v. Allen*, 7 Car. & P. 153. But there is no authority for the position that without an act of commission there can be no manslaughter; and, on the contrary, the general doctrine seems well established that what constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence.

Conviction affirmed.

PEOPLE V. WILLIAMS.

(35 California, 671. Supreme Court, 1868.)

¹ **Larceny of ore—Time between severance and asportation.** The severance and asportation of ore must be so separated as not to constitute one continuous act, to constitute the crime of larceny. The time between the act of severance and the act of asportation need not be "at least one day," but there must be such an intervention of time as will constitute them several transactions.

Indictment for larceny of quartz—Duplicity—No implied severance. An indictment charging that the defendant "did unlawfully and feloniously take, steal and carry away from the mining claim of the B. M. Co. * * * fifty-two pounds of gold bearing quartz rock, the personal property of said B. M. Co. of the value of four hundred dollars" does not sufficiently imply a severance from the realty. It is capable of a double interpretation. The property taken should be so described as to enable the court to decide for itself whether the property is "personal goods."

Appeal from the County Court of Sierra County.

The facts are stated in the opinion of the court.

JO HAMILTON, Attorney General for the People.

The indictment was sufficient, and judgment should not have been arrested: *People v. Cronin*, 34 Cal. 191; Gould's Pl., Secs. 53, 57; Archb. Cr. Pl. 54; Gales' Mining Laws, 356; *Table Mountain v. Stranahan*, 20 Cal. 198; Crim. Pr. Act, Sec. 237; *People v. White*, 34 Cal. 183; *People v. King*, 27 Cal. 509; *People v. Ah Woo*, 28 Cal. 208.

P. VAN CLIEF, for respondent.

Quartz rock not severed from the land is not the subject of larceny, because it is a part of the realty: *Regina v. Cox*, 1 Carr. & Kirw. 494; Whar. Cr. L., Secs. 1,754-5; Whar. Pr., note a, 191; *Rough's Case*, 2 East's Pleas of the Crown; 2 Russ. on Cr. 83, 84; 2 Bish. Cr. Pr., Secs. 663, 669, 672.

For aught that appears from the indictment, the quartz rock may have been severed from the land or claim at the time of the taking charged, so that they together constituted but one act. At least the indictment will as reasonably bear this construction as any other. But if it should be admitted

¹ *State v. Burt*, 4 M. R. 190; *State v. Berryman*, 4 M. R. 199.

that it will as reasonably bear the other construction, yet as upon the first no offense would be charged, it follows that the indictment is fatally defective for want of the directness and certainty required by the two hundred and forty-sixth section of the Criminal Practice Act.

By the court, CROCKETT, J.

The defendant having been found guilty of grand larceny, moved to arrest the judgment, on the ground that the indictment does not charge the commission of a felony, and is insufficient. The court arrested the judgment, and the prosecution has appealed.

The indictment charges that the defendant "did unlawfully and feloniously take, steal and carry away from the mining claim of the Brush Creek Gold and Silver Mining Company—a corporation duly organized under the laws of the State of California—fifty-two pounds of gold-bearing quartz rock, the personal goods of the said Brush Creek Gold and Silver Mining Company, of the value of four hundred dollars."

The defendant maintains that the indictment is insufficient, because it does not appear therefrom that the quartz rock had, on a previous occasion, been severed from the ledge, and thus become personal property, before the alleged taking by the defendant; and that there is no averment which rebuts the inference that the rock may have been broken or dug out of the mine by the defendant himself, and immediately taken away; in which event, it is claimed, the offense was only a trespass on real property, and not a larceny; which can only be predicated on the felonious taking of personal property.

The question for decision is, whether or not the indictment charges in sufficiently explicit terms that the rock, at the time of the commission of the offense, was personal property, and not a part of the realty.

The Criminal Practice Act, section two hundred and forty-six, provides that an indictment shall be sufficient in that respect, if the "act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a per-

son of common understanding to know what is intended"; and if "the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

Applying this rule to the indictment under discussion, would a person of "common understanding," on reading it, infer that the defendant severed the rock from the ledge and immediately carried it away, or rather that, finding it already severed by some one else, or having himself severed it on a previous occasion, he afterward removed it? If it be doubtful in which sense a person of common understanding would interpret the indictment, it is insufficient, unless it necessarily imports the crime of grand larceny, whether it be understood in one sense or the other. It should appear plainly and explicitly on the face of the indictment, that a larceny, and not a mere trespass, was committed. If the language employed be capable of two interpretations, without doing violence to its terms, only one of which imports a charge of larceny, the indictment is bad. A person charged with crime has a right to be informed, in plain intelligible language, free from reasonable doubt, of the specific act which he is alleged to have committed.

Does it plainly appear from this indictment whether the rock alleged to have been stolen was severed by the defendant from the ledge at the time of the theft, or whether it had been severed on a previous occasion and was carried away on a subsequent occasion?

The indictment obviously leaves this question in doubt. It is entirely silent as to whether the rock was a part of a ledge, and was broken off and immediately carried away by the defendant, or whether, finding it already severed, he afterward removed it. In either case it might be true, as alleged in the indictment, that the defendant did "steal, take, and carry away from the mining claim of the Brush Creek Gold and Silver Mining Company * * * fifty-two pounds of gold-bearing quartz rock"; and yet, in the first event it would be only a trespass, whilst in the latter it would be a larceny, as these offenses have been defined by numerous authorities. But an indictment should be capable of no such double inter-

pretation. It should state facts which, if true, would necessarily import that the crime imputed to the defendant had been committed. We have seen that this indictment does not come up to this standard, and that all the facts which it avers may be true without necessarily implicating the defendant in the crime of grand larceny.

We have not overlooked the fact that the indictment avers the rock to have been "the personal goods of the said Brush Creek Gold and Silver Mining Company." But this can not cure the infirmity of the indictment, which should describe the property taken with sufficient accuracy to enable the court to decide for itself whether it be of a character which renders it a subject of larceny. It is not sufficient to denominate the property as "personal goods," without describing it so as to enable the court to decide that question for itself. We have thus far discussed the case on the theory that if the rock formed a part of a ledge or lode, and was severed by the defendant and immediately removed by him, the offense was only a trespass, and not a larceny.

We find in the books much subtle reasoning in respect to the difference between trespass and larceny in this class of cases. From an early period in English jurisprudence, it has been held that in consequence of the stable and permanent nature of real estate, an injury to it is not indictable at common law; and it is therefore not larceny to steal anything adhering to the soil. Hence it has been held that if a person, with a felonious intent, severs and carries away apples from a tree, or the tree itself, or growing grass or grain, or copper or lead attached to a building, the offense is only a trespass, and not larceny. But if the thing had been previously severed from the soil, whether by the owner or by a third person, or even on a previous occasion by the thief himself, it has thus become personal property, and is the subject of larceny. This rule involved many technical niceties, which have resulted in what appear to us to be pure absurdities. For example, if the article stolen was severed from the soil by the thief himself and immediately carried away, so that the whole constituted but one transaction, it was held to be only a trespass; but if, after the severance, he left the article for a time and afterward returned for it and took it away on an-

other occasion, then it became a larceny. It therefore became necessary to determine what space of time must intervene between the severance and the taking to convert the trespass into a larceny. At first it was held that at least one day must intervene, on the theory that the law would not take notice of the fractions of a day. But this rule has been relaxed, and it is now held that no particular space of time is necessary; only the severance and taking must be so separated by time as not to constitute one transaction.

The authorities maintaining these nice distinctions are fully collated in 2 Bishop on Criminal Law, Secs. 667, 668, 669.

We confess we do not comprehend the force of these distinctions, nor appreciate the reasoning by which they are supported. We do not perceive why a person who takes apples from a tree with felonious intent should only be a trespasser, whereas, if he had taken them from the ground, after they had fallen, he would have been a thief; nor why the breaking from a ledge of a quantity of rich gold-bearing rock with felonious intent should only be a trespass, if the rock be immediately carried off; but if left on the ground, and taken off by the thief a few hours later, it becomes larceny. The more sensible rule, it appears to us, would have been, that by the act of severance the thief had converted the property into a chattel; and if he then removed it, with a felonious intent, he would be guilty of a larceny, whatever dispatch may have been employed in the removal. But we do not feel at liberty to depart from a rule so long and so firmly established by numerous decisions; and we have adverted to the question mainly for the purpose of directing the attention of the legislature to a subject which appears to demand a remedial statute.

Judgment affirmed, and ordered that the remittitur issue forthwith.

Mr. Justice SANDERSON and Mr. Justice RHODES expressed no opinion.

Affirmed.

STATE V. BURT.

(64 North Carolina, 619. Supreme Court, 1870.)

Nugget. A nugget of gold, separated from the vein by natural causes and found loose upon the surface is parcel of the realty, and when taken and carried away by one continued act, it is not larceny.

Larceny, tried before WATTS, J., at Spring term, 1870, of Franklin Court. There was a special verdict, finding that there was a verbal contract between Burt and the owner of a gold mine, that the former might run a rocker in such mine, paying a certain rent; that the other defendants were working with Burt; that one of these employes found a nugget of gold lying upon the land of the owner of the mine, on the top of a rock pile, not a part of the proceeds of the rocker; and that after consultation with the other defendants, it was appropriated to their own use, and was never accounted for to the owner. His Honor thereupon gave judgment for the defendants, and the solicitor for the State appealed.

ATTORNEY GENERAL, for the appellant; ROGERS & BACHELOR, *contra*.

DICK, J.

Nuggets of gold are lumps of native metal, and are often found separated from the original veins. When this separation is produced by natural causes, there is no severance from the realty, but such nuggets will pass under a conveyance like ores, and minerals which are imbedded in the earth. When ores and minerals are taken out of mines with expense, skill and labor, to be converted into metals, or used for the purpose of trade and commerce, they become personal property, and are under the protection of the criminal law.

In England, ores, even before they are taken from the mines, are protected by highly penal statutes. St. 7 and 8 Geo. IV, amended by 24 and 25 Vict. Loose nuggets which are occasionally found in gullies and branches, and in woods and fields, are hardly considered by the law as the subjects of determinate property, until they are discovered and

appropriated, and then they become personal goods, and are the subjects of larceny.

In this respect they somewhat resemble treasure trove, waifs, etc., in the criminal law of England.

It is an ancient rule of the common law, that things which savor of, or adhere to realty, are not the subject of larceny. In this respect the common law was very defective, and did not afford sufficient protection to many valuable articles of personal property which were constructively annexed to the realty. These defects have in some degree been remedied by a number of statutes in this country and in England.

These beneficial changes were induced by the necessities of progressive civilization, which required many valuable species of personal property to be annexed to realty, to be used for the purposes of trade and manufacture, and in the arts; and which needed the constant protection of the criminal law.

In a case like ours, there is no necessity for the court to depart from the ancient technical strictness of the common law, and there is no need of any additional legislation upon such a subject.

In public estimation it has never been regarded as larceny for the fortunate finder of a nugget of gold, or a precious stone, to appropriate it to his own use, although found upon the land of another person.

Hundreds of instances of this kind have doubtless occurred, and yet no case can be found of a prosecution for larceny on this account, either in the courts of this country or of England. This fact sustains us in the opinion, that for cases like the one before us, there is no necessity to depart from the ancient landmarks established by the fathers of our criminal jurisprudence.

The nugget was found upon a loose pile of rocks by one of the defendants, and the taking and carrying away was one continued act, and did not amount to larceny, but was only a civil trespass: 1 Hale P. C. 510; 2 East P. C. 587; Roscoe Crim. Ev. 459; 2 Russell on Cr. 136; 2 Bish. Cr. Law, s. 779.

There was no error in the ruling of his Honor, and the judgment must be affirmed.

PER CURIAM.

Judgment affirmed.

FARNUM V. UNITED STATES.

(1 Colorado, 309. Supreme Court, 1871.)

Amending caption for indictment. Where the style of the court is misdescribed in the caption of an indictment, it may be amended on motion of the District Attorney.

Description of letters in indictment for secreting same. In an indictment against a mail carrier for secreting or embezzling letters, it is not necessary to state to whom the letters were sent nor by whom they were written.

Mail carrier embezzling bag of gold dust. A defendant can not be convicted under § 12, Act of 1864, when it is not charged that the gold was contained in a letter or packet of letters and there is no count averring that he secreted, embezzled or destroyed any bag of letters containing the gold dust. Under that section, he can not be convicted of a mere embezzlement of gold dust.

Error in instructions. Where a case is tried under a misapprehension of the law, the judgment below must be reversed.

Error to District Court, First Judicial District.

The indictment was entitled, "The District Court of the United States of America, within and for the first judicial district of Colorado territory, of the term of June, in the year of our Lord one thousand eight hundred and seventy. At a regular term of the District Court of the United States of America, within and for the first judicial district of Colorado territory, begun and held at Denver City, on the fourteenth day of June," etc., etc.

The defendant below moved to quash the indictment, upon the ground that it was entitled of a court not known to the law. He also objected, that there was no offense charged. The district attorney filed a cross-motion to amend the caption of the indictment by striking out the words "of the United States of America," so as to make the same read "the District Court within and for the First Judicial District."

Defendant's motion was overruled, and the cross-motion allowed. The evidence and the indictment are sufficiently set forth in the opinion. The jury found the defendant guilty.

Messrs. BROWN, HARRISON & PUTNAM, for plaintiff in error.

L. C. ROCKWELL, U. S. District Attorney, for defendant in error.

BELFORD, J.

The defendant was indicted at the July term, 1869, of the Arapahoe District Court, for secreting and embezzling one package of letters and two sacks of gold dust, with which he had been intrusted, as mail carrier, and which were intended to be conveyed by post. There are seven counts in the indictment, all charging the same offense, but in the first, sixth and seventh counts, the defendant is charged as a carrier of the mail on the route from Fairplay to Helena, and as being then and there a person employed in a department of the post-office establishment of the United States. The defendant moved to quash the indictment for error in the caption, whereupon the attorney-general filed a cross motion and asked leave to amend the caption, which leave was granted, and the motion to quash overruled. The defendant then entered a plea of not guilty, and was put upon his trial. The jury found him guilty on the first, third, sixth and seventh counts, and not guilty on the second, fourth and fifth counts. Motions for new trial and in arrest of judgment were overruled.

The first error assigned is the overruling of the motion to quash and permitting the attorney-general to amend the caption of the indictment. It is claimed by the plaintiff in error that the caption is a part of the indictment, and can not be amended. In this view we are unable to concur. Bishop in his work on Criminal Procedure, vol. 1, sec. 151, says: "In matter of legal principle, this extended commencement or caption is no part of the indictment, as sworn to by the grand jury; it is a mere formal statement, which, though placed at the head of the indictment, is still of no higher nature than is an entry on the docket, made in court by the clerk—a thing, which if erroneous, is subject like a docket entry to be corrected by an order of the judge, or when it becomes transferred into the permanent records, to be amended to the same extent as any other part of those records. And it is believed, that though the decided cases may not be very distinct to this effect, and though some of them may even seem to come

short, this doctrine is, on the whole, sustained by adjudged law."

In Archibald's Criminal Practice, vol. 1, page 260, it is said: "But, though the caption, like the indictment itself, may, if defective, be either quashed by the court or demurred to on the part of the defendant, it differs materially from it in its capacity of amendment, for the return to the court is merely a ministerial act and ministerial acts may be amended at any time according to the common law."

In the case of the *United States v. Thompson*, 6 McLean, 57, the same objection urged to this indictment, namely, "that the court is not properly entitled," was passed upon, and Judge WILKINS says: "We consider that this objection has been long settled, both in England and in this country."

The caption forms no part of the indictment or presentment of the grand jury, and he adds: "It is only matter of astonishment, that such a technical exception should now be gravely urged in court." *Moody v. The State*, 7 Blackf. 424; *The State v. Gilbert*, 13 Vt. 647.

Before proceeding to examine the action of the court in overruling the motion for new trial, and in arrest of judgment, it may be proper to allude to some objections made to the form of the indictment. It is claimed by the plaintiff in error that the indictment is bad, because it fails to describe the letters which it is alleged the defendant secreted and embezzled. In the case of the *United States v. Lancaster*, 2 McLean, 433, the court say: "Is it essential that the letter charged to have been embezzled should be described by stating to whom it was directed, and by whom it was written? This description is generally given when it is procurable. But it is seldom in the power of the prosecuting attorney to state these facts, much less to prove them. A postmaster or carrier, after having stolen a letter from the mail, will not be likely to preserve it as the evidence of his guilt. When the act is done deliberately, as may be presumed to be the case, generally, when done by a postmaster, there is not one instance in a thousand, perhaps, when the letter is not destroyed. And, if a particular description of it be essential to the validity of the indictment, a conviction under this or any other similar provisions of the act would be hopeless.

The security of individuals does not seem to demand this particular description of the letter, and to require it would, in most instances, defeat the great purposes of justice."

It is further claimed by the plaintiff in error that the evidence shows that the route over which Farnum carried the mail is different than that described in the indictment. We do not think so. The indictment would be good if the description of the route had been entirely omitted. It has been held, that whatever is not necessary to constitute the offense may be treated as surplusage. This is particularly the case when the offense is statutory, and in such a case it is always sufficient to charge the offense in the words of the statute, although more particularity is required in bringing the offense within it. Whenever, as in this case, more words are used than are necessary to make out the offense, I think the remaining may be rejected as surplusage: *Crichton v. The People*, 6 Parker's Crim. Rep. 370. If reference is had to the evidence of Tabor, it will be seen that a description of the route, as laid in the indictment, was proven.

In the case of the *United States v. Paterson*, 6 McLean, 466, it was held that a general averment that the party was employed in the post-office establishment of the United States is sufficient.

Did the court err in overruling the motion for a new trial? Inasmuch as the defendant was acquitted on the second, fourth and fifth counts, it will not be necessary to advert to them in this opinion. In the first count it is charged that Henry P. Farnum, being a person then and there employed in a department of the post-office establishment as mail carrier, etc., did embezzle and destroy two packages of letters and two packages of gold dust and two sacks of gold dust, with which he was then and there intrusted, and which packages of letters and packages of gold dust had then and there come to his possession, and was then and there intended to be conveyed by post, etc. The third count charges that the defendant did feloniously take the mail of the United States of America, and two certain packages of letters, and two certain sacks of gold dust, and packets therefrom, and did open, embezzle and destroy such mail, packages, letters, sacks of gold dust and packets; the said two packages of letters

and packet containing articles of value, and the said two sacks of gold dust being of the aggregate value of \$1,200. In this count it is not alleged that he is an employe of the post-office establishment. The sixth count charges that the defendant, being employed in a department of the post-office establishment, did embezzle and destroy a letter and two sacks of gold dust with which he was then and there intrusted, and which had then and there come into his possession, and were then and there intended to be conveyed by post, etc. The seventh count charges that the defendant, being a person employed in a department of the post-office establishment, did, with force and arms, secrete and embezzle two sacks of gold dust of the value, etc., with which he had been intrusted, and which was intended to be conveyed by post, etc. The evidence in the case was substantially as follows: Horace A. W. Tabor testifies that, on the 21st day of June, 1869, the day named in the indictment, he was postmaster at Oro city, Lake county, Colorado; that, on the morning of that day, he put the mail up and put in the mail sack two bags of gold dust; they were tied with a string, and to them a tag was attached, on which were the directions; an envelope was wrapped around them. When Farnum reached the post-office at Granite, and the mail sack was opened, a package of letters and the sacks of gold dust were missing. It further appears that there was a rent in the mail bag. Search was instituted for the missing letters and gold dust, and, at a point between Oro and Granite, and some distance from the trail usually pursued by Farnum in carrying the mail, a package of letters was found, which Tabor swears was mailed by him on the twenty-first.

The defendant was thereupon arrested, and a few days subsequently search was made for the missing gold dust on Farnum's premises, and discovered in a tin can under a corn chest in Farnum's stable. There was evidence also going to show that Farnum had previously stated, that, unless he was paid for the labor he had performed in transporting the mail, "a mail bag would turn up missing some day." It nowhere appears that the letters, which it is alleged Farnum secreted and embezzled, contained any article of value. To the introduction of evidence in reference to the bags of gold dust,

the defendant below objected, on the ground that the same was notailable matter. This objection was overruled, and this ruling is assigned for error. The statute on which the first, sixth and seventh counts of this indictment are based will be found in the thirteenth volume of the United States Statutes at Large, page 337, section 12, which reads as follows: "That if any person employed in any department of the post-office establishment shall unlawfully detain, delay or open any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall have come to his possession, and which are intended to be conveyed by post; or if any such person shall secrete, embezzle or destroy any letter or packet intrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to, money as hereinafter described, every such offender, being thereof duly convicted shall, for every such offense, be fined not less than \$300, or imprisoned not less than six months, or both. And if any person employed as aforesaid shall secrete, embezzle or destroy any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall come to his or her possession, and are intended to be conveyed by post, containing any bank note, * * * or any other article of value, such person shall, on conviction, be imprisoned not less than ten nor more than twenty-one years."

It will be observed that this section defines different offenses and prescribes different punishment. The secretion, embezzling or destroying of a letter containing no article of value, is defined to be one offense, and the punishment adjudged is fine not less than \$300, and imprisonment not less than six months.

The secreting, embezzling or destroying a letter containing any article of value is another offense, and a different punishment is prescribed.

It must be further observed that this section applies to persons employed in the departments of the post-office and to none others.

In neither of the counts in the indictment, in which the defendant is designated as a person employed in the departments of the post-office, and on which he has been adjudged guilty, is it alleged that the letters secreted and embezzled contained any article of value, nor is it charged that the gold

dust was contained in any letter or packet of letters, or bag or mail of letters. Before a jury can find a person guilty under the latter portion of this section, which adjudges a ten years' term of imprisonment, they must find that he secreted, embezzled or destroyed a letter or packet of letters, or bag or mail of letters containing some articles of value. It must be so charged in the indictment, and so established in the evidence. After a careful examination of this provision we have reached the conclusion that the secreting and embezzling of the gold dust by the defendant is not an offense against the law under consideration, for the reason that it nowhere appears that the gold dust was contained in a letter or packet of letters, and for the further reason that it is not charged in any of the counts of the indictment that the defendant secreted, embezzled or destroyed any bag or mail of letters containing the gold dust.

If the defendant is liable to conviction and punishment at all, it must be under that provision of the section which declares that, if any person employed in any of the departments of the post-office establishment shall secrete, embezzle or destroy any letter or packet intrusted to such person as aforesaid, and which shall not contain any article of value, such person shall, for every such offense, be fined not less than \$300, or imprisoned not less than six months.

The cause seems to have been tried entirely upon the hypothesis that the defendant was answerable, as charged in the indictment, for the embezzling of the gold dust. On this theory the instructions were based and given, and on this theory the jury acted in making up their verdict, and the court in assessing the punishment.

The third count of the indictment, and on which he was adjudged guilty, charges him with secreting and embezzling a letter containing an article of value, but it does not charge that he was employed in any department of the post-office establishment. This count is based on the eighty-first section of the act defining crimes: 1 Brightly's Digest, 217. The conviction on this count can not be supported. There is not a shred of testimony tending to show that the letters secreted and embezzled contained any article of value. The seventh count can not be sustained, for the reason that it re-

fers exclusively to secreting and embezzling the gold dust, and does not allege that it was contained in any letter, packet of letters, bag or mail of letters.

We have, then, the first and sixth counts left, with the defendant charged in each with secreting and embezzling a packet of letters containing no article of value.

If the defendant, under the evidence, could have been convicted at all, it must have been under these counts and for the offense of secreting letters containing no article of value, and for this crime he could only be punished by the imposition of a fine not less than \$300, or imprisonment not less than six months, or both. The judgment of the court, in sentencing him to ten years' imprisonment, is not warranted by the law. Inasmuch as this case has been tried under a misconception of the law, the judgment of the court below is reversed, and the same remanded for a new trial.

Reversed.

STATE V. BERRYMAN.

(8 Nevada, 262. Supreme Court, 1873.)

¹ **Indictment for larceny of ore—Severance from realty.** It was objected to an indictment for the larceny of "610 pounds of silver-bearing ore," that the property alleged to have been stolen savored of the realty, and the indictment did not show it to be personal property. *Held*, that the words "silver-bearing ore," refer to a portion of vein matter which has been extracted from a lode and a sorted, separated from the mass of waste rock and earth and thrown aside for milling or smelting purposes, or taken away from the ledge; and that they necessarily imply a severance from the freehold.

Trespass and larceny of ore distinguished—Lapse of time. If ore be severed from a ledge and feloniously removed without the intervention of any time, there is no larceny but one continuous act which constitutes only a trespass, but to constitute larceny it is not necessary that any particular time should elapse between the severance and the carrying away.

Error without prejudice. A cause will not be reversed for the admission of irrelevant testimony, if it appears that the appellant was not prejudiced thereby.

¹ *People v. Williams*, 4 M. R. 185.

Appeal from the District Court of the Sixth Judicial District, Lander County.

The defendant, John Berryman, having been indicted jointly with Joseph Oxford for the crime of grand larceny, and having on a separate trial been convicted as charged, was sentenced to the State prison for the term of one year. Oxford had previously been tried, convicted and sentenced to the same term. The defendant Berryman moved in arrest of judgment and also for a new trial, both of which motions were denied. He then appealed from the judgment.

It appeared from the testimony that the ore alleged to have been stolen was found concealed in the cabin of the defendants. It was a peculiar kind of ore and had evidently been taken from the mine of the Manhattan Company at a place where defendants had been employed to work for the company. When discovered, and while the ore was being removed from the cabin, Oxford stated that he and Berryman had bought it from one John Bone at the same time that they purchased the cabin from him. Testimony of this statement of Oxford was admitted on the trial of Berryman against his objections that it was made in his absence and was irrelevant as to him. But it further appeared in evidence that Berryman, upon his preliminary examination had himself volunteered as a witness on his own behalf and had himself made the same statement. Further evidence showed that Bone never sold them any ore, and that it was not in the cabin when they purchased.

Among the instructions given were the following, asked by plaintiff:

"If the jury believe that the defendant in this case took the ore in question from the Black Ledge Mine named in the indictment, in small quantities and at different times, but that such taking was continuous and systematic, and that the object of defendant was to take a quantity of greater value than fifty dollars, and that he removed a little at a time only to escape detection to a place of concealment near the mine to be thence removed at his convenience, and that he did take away feloniously more than fifty dollars' worth of ore, this would be grand larceny and not a series of petit larcenies."

"The jury are instructed that in order to make the felo-

nious taking of ore from a mine, it is not necessary that any particular length of time should elapse between the severance and the carrying away; and if they should believe that the defendant severed the ore from the mine, then laid it aside, and afterward feloniously carried it away from the mine, the taking constituted the crime of larceny."

Among the instructions asked by defendant and given were the following:

"If the jury find that the ore alleged to have been taken by defendant was a part of the Black Ledge and that the same belonged to and savored of the realty, and there is no proof to convince the jury that any time intervened between the taking of the rock from the ledge and the removal from the shaft, then there is no larceny but one continuous act which constitutes only a trespass."

"If the jury find from the evidence that the defendant severed the rock from the ledge and carried it away immediately after the severance, making one continuous act, then there is no larceny."

GEORGE W. BAKER and W. H. DAVENPORT, for appellant.

GEO. S. HUPP, for respondent.

By the court, HAWLEY, J.

Appellant, having been convicted of grand larceny, moved to arrest the judgment upon the ground that the indictment did not state facts sufficient to constitute a public offense. The court refused the motion and appellant thereupon appeals from the judgment.

The indictment charges "that said defendants, Joseph Oxford and James Berryman, on the thirtieth day of July, A. D. 1872, * * at the County of Lander, in the State of Nevada, * * six hundred and ten pounds of silver-bearing ore, of the value of eight hundred dollars, of the property of the Manhattan Silver Mining Company of Nevada, a corporation duly organized and existing, * * did feloniously * * steal, take, and carry away. * * * "

It is claimed that the property alleged to have been stolen savors of the realty, and that there is no sufficient statement of facts in the indictment showing it to be personal property.

The rule that things savoring of the realty are not the subject of larceny is stated by Sir Matthew Hale as follows: "If a man cut and carry away corn at the same time it is trespass only, and not felony, because it is but one act; but if he cut it and lay it by and carry it away afterward it is felony." *Emmerson v. Annison*, 1 Mod. 89. The reasons given by Blackstone (4 vol. p. 232) for this distinction is that "Lands, tenements and hereditaments (either corporeal or incorporeal) can not, in their nature, be taken and carried away. And of things, likewise, that adhere to the freehold, as corn, grass, trees and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable. And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor, in this their newly-acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at another time when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner or any one else has severed them."

The rule containing this subtle and unsatisfactory distinction is sustained by all the authorities: 2 Bishop on Cr. L., Sections 779, 780, 781, 782, and authorities there cited. There is some conflict in the authorities as to what interval of time must elapse between the acts of severance and asportation. The doctrine seems now to be settled, as laid down in Bishop, that no particular space is necessary, only the two acts must

be so separated by time as not to constitute one transaction.

There is no substantial reason why the thief who, with felonious intent, takes and carries away apples from a tree, lead pipe from a building, or quartz rock containing precious metals from a mine, etc., etc., at one time, should not be punished the same as the thief who first severs the things from the freehold and afterward goes back and carries them away. It is the criminal intention that constitutes the offense, and this intention is the only criterion by which to distinguish a larceny from a trespass. In our judgment the more sensible rule would be that as soon as the things which savor of realty are severed from the freehold, they become *eo instante* the personal property of the owner, the felonious taking and carrying away of which would constitute larceny.

So far as the present case is concerned, it is unnecessary to depart from the beaten path of precedent which the authorities have (as we think without substantial reason) established. In *The People v. Williams*, 35 Cal. 673, cited and relied upon by appellant, the indictment was for taking and carrying away "from the mining claim of the Brush Creek Gold and Silver Mining Company * * fifty-two pounds of gold-bearing quartz rock." The court said that the indictment was "entirely silent as to whether the rock was a part of a ledge and was broken off and immediately carried away by the defendant, or whether, finding it already severed, he afterward removed it." The court held that the indictment was therefore capable of a double interpretation and for this uncertainty it was set aside. Larceny is the felonious taking and carrying away the personal goods or chattels of another, and if the facts stated in the indictment do not show that the ore was personal property at the time of the commission of the offense, the indictment can not be sustained. The character of the property, whether real or personal, must be determined by the statement of facts set out in the indictment. Sec. 241 of the Criminal Practice Act provides that "the words used in an indictment shall be construed in the usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning." The word ore is not defined by law, and must therefore be construed in its usual ac-

ception.¹ The words "silver-bearing ore," as used in the indictment, have reference to a portion of vein matter which has been extracted from a lode and assorted, separated from the mass of waste rock and earth, and thrown aside for milling or smelting purposes, or taken away from the ledge. Webster gives the following definition: "Ore (mining). The ore of a metal with the stone in which it occurs, after it has been picked over to throw out what is quite worthless." In our judgment, the language used in the indictment necessarily implies that the ore had been severed from the freehold prior to the time of its asportation by Oxford and Berryman. We think that the act charged is stated with sufficient certainty to enable the court to pronounce judgment according to the right of the case, and that is all the statute, in this respect, requires: Crim. Prac. Act, 461, Sec. 243.

From the testimony elicited at the trial, it appears that Oxford and appellant while engaged at work upon the Black Ledge owned by the corporation had (in small quantities and at different times) feloniously carried away therefrom the "six hundred and ten pounds of silver-bearing ore." The question whether the acts of severance and of asportation were so separated by time as not to constitute one transaction was, under proper instructions, fairly submitted to the jury.

The court did not err in overruling appellant's motion in arrest of judgment. Appellant asks a reversal of the case upon the ground that the court erred in admitting the statement of Joseph Oxford, made after the commission of the offense, to the effect that the ore in question was bought from one John Bone at the same time that the cabin in which Oxford and appellant lived, and in which the ore was found, was purchased. This testimony was irrelevant and should have been excluded: 1 Green. on Ev. Sec. 111; *The State v. Ah Tom*, 8 Nev. 213. But it is evident that appellant was not prejudiced by its admission. In fact, the record shows that during his preliminary examination Berryman made substantially the same statement, which was properly admitted in evidence.

The judgment of the District Court is affirmed.

¹ We know of no other mining region where the word "ore" implies ore severed from the realty: Morrison's Min'g. Dig.; p. 253.

UNITED STATES V. WAITZ.

(3 Sawyer, 473. U. S. District Court, District of Nevada, 1875).

Extortion—Land office. The register of the United States land office can not act as an attorney for an applicant for patent to mineral land; and if he receive from such applicant a gross sum in part as his official fee, in part as charge for services as an attorney, such receipt of money is extortion.

The defendant Waitz was indicted for extortion while register of the land office. On the trial, the evidence tended to prove that Waitz had taken from one Ellen Grandona, an applicant for a mineral patent, the sum of \$200, as a fee for obtaining a patent for her; that Waitz had at one time been admitted to the bar as an attorney-at-law; that he took this money from Mrs. Grandona partly as an attorney fee for conducting the proceeding to obtain the patent before himself, and partly for fees as register; that no particular portion of the money was taken either as register or attorney fee, but the work which he claimed to do as attorney, and his official duties as register were all mixed and indiscriminately joined together, and a gross sum of money taken for the whole.

C. S. VARIAN, United States' Attorney.

C. E. DELONG, for defendant.

HILLYER, J.

Charged the jury upon the main proposition in the case as follows:

Section 5481 of the Revised Statutes provides that "every officer of the United States who is guilty of extortion, under color of his office, shall be punished by fine," etc.

Extortion is thus defined: It is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or the taking of any money or thing of value, by color of his office, in excess of what is due him, or before it is due to him.

The fees of the register of the land office are prescribed by law, and it is a general rule that no public officer may lawfully

take any other fees or rewards for doing anything relating to his office than such fees as some statute in force gives him.

The statute law of the United States allows the following compensation to registers: First, a salary of \$500 a year; second, a commission of one per centum on all moneys received at the receiver's office of his land district; third, a fee of five dollars for filing and acting upon each application for mineral lands; fourth, a fee of twenty-two and a half cents per hundred words for writing done in the land office in establishing claims for mineral land. Their compensation for one year, including salary, commissions and fees shall not exceed \$3,000.

It is further enacted that upon satisfactory proof that a register has charged or received fees or other rewards not authorized by law, he shall forthwith be removed from office. He is also required to administer all oaths required by law or the instructions of his department, connected with the entry and sale of public lands without charging or receiving directly or indirectly any fee therefor.

From all these provisions of the law it is plain that the compensation of a register of the land office is definitely fixed by the statutes of the United States, and that it is not lawful for him to charge or receive any other fees or rewards, directly or indirectly, for doing anything relating to his office of register. It is the aim of the law maker in fixing the fees of a public officer to give him what will be sufficient pay for doing the duties required of him. It will rarely or never happen that everything which it is the duty of the officer to do is set down in the fee bill. But a salary, or commission, or fee is given him which will make the office sufficiently remunerative in the judgment of the legislators. For those items for which a fee is fixed, the officer must take the sum given and the applicant must pay it and be content. Those duties for which no fee is set down in the law must still be performed by the officer without charge, or rather are regarded as covered by the salary, the commissions or fees given for other matters: *Irwin v. Commissioners*, 1 Ser. & R. 505.

In the next place it will be advisable to ascertain as clearly as may be, what the duties of a register are in reference to these applications for mineral lands, and then having a

knowledge of his duties and his lawful fees, you will be able, I trust, without difficulty, to come to a right decision upon the main question in this case, viz., whether money was taken by the defendant from the prosecutrix for the execution of his official duty, when either no fee was due for the service, or when a less one was due than he took.

By section 2478 of the U. S. Revised Statutes, the commissioner of the general land office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulation, this statute in relation to mineral lands. He has made these regulations and I will now call your attention to some of them.

[The judge here read from the instructions of the commissioner of the general land office in relation to the survey and entry of lode and placer claims.]

From these instructions you will see that the duties of register extend over and have relation to everything that is done from filing the application until the papers are sent to Washington with his and the receiver's opinion on them. It is true he is not bound to draw up the paper called an application, but if he does he can lawfully charge but fifteen cents a folio of one hundred words for writing it. So as to other affidavits in land cases.

It is not denied that the defendant took a larger sum of money from Mrs. Grandona than he was entitled to as register, but his plea is that the money was taken as an attorney's fee, not as a register's fee. This plea of the defendant has received much consideration on my part, and the result is, that I consider it perfectly clear, and so charge you, that the defendant, while register, could not lawfully act as attorney for any applicant for a patent whose application was filed, and the proceedings on which were to be conducted before him and in his office.

Many of the duties of the register are of a judicial character, and require the exercise of his impartial judgment. He should see that no fraudulent claim is enforced against the government. He has to pass upon the regularity of all the proceedings, and how can he do this impartially if he is the paid attorney of either party before him? But if this thing might lawfully be done, a more serious evil would result from

the power it would give the officer to obtain money from those who were compelled to come to him as register. The compensation of the register is fixed by law, as well as his duties; citizens are compelled to go to him to make an application for patent, and hence it is of great importance that his fees should be fixed with precision, so that he may have no excuse for taking excessive fees or imposing upon the ignorant. For this reason the legislature have fixed the fees of the register, so that each citizen may know what he has to pay. But the register can not lawfully engage himself to an applicant to do all that may be necessary to get a patent, and charge a gross sum for his services, covering his legal fees and those he is not entitled to as register. And the reason is, that in so doing he puts himself on unfair ground toward the applicant. Some of the services he is bound to apply to the register for, because no one else can do them; hence to allow him to take a sum in excess of his legal fees under the name of attorney's fee would be in effect the placing of every applicant for a patent in the power of the register.

Upon this branch of the case, I give you the following instruction: If you believe from the evidence that Mrs. Granda paid the defendant two hundred dollars, or other sum, for getting her patent, and that this sum was paid defendant as well for the execution of his official duties as doing some other things relating to the getting of the patent, and that there was no specified portion of it taken as compensation or fee for the one or the other, and that the sum taken was in excess of his legal fees, then the taking of the money was extortion.

HUTCHISON AND BATCHELDER V. THE COMMON-WEALTH.

(82 Pennsylvania State, 472. Supreme Court, 1876.)

Larceny as bailees—Conversion of receipts for oil in store. B. was the owner of several hundred barrels of oil in the pipes or tanks of the Union Pipe Line, for which he had two accepted orders on said company. B. delivered these orders to the firm of H. & B., oil dealers, and

took from them a receipt, the terms of which were, that the oil was to be held for storage at five cents a barrel per month. At the time of the delivery of the accepted orders to H. & B., the oil was in the tanks or pipes of the Pipe Line, and undistinguishable from the other oil therein. H. & B. deposited the orders to the credit of their general account with the Pipe Line, and thereafter deposited and drew until they became embarrassed, and, to meet their engagements, continued to draw on their balances on the books of the company until they failed. B. demanded the oil, and H. & B. were unable to deliver it. *Held*, that the delivery of the accepted orders was a delivery of the oil, and constituted a bailment, and the defendants having converted the oil to their own use, the conversion was fraudulent, and they were guilty of larceny as bailees.

Indictment—Embezzlement—Larceny by bailee. The first count of the indictment charged the defendants with embezzlement as “trustees and agents”; the third, with embezzlement as “bailees”; the fourth, with embezzlement as “trustees, agents and bailees,” and the fifth with larceny as “bailees and agents.” *Held*, that the first and fourth should have been quashed, because they blended two or more offenses in one count, and the third because there is no such offense at common law nor under the code as “embezzlement as bailee.” *Held*, also, that the fifth count was good: that there being no such offense as “larceny as agents,” the word “agents” did not introduce another offense into the count, but should be rejected as surplusage.

Demurrer to evidence—Judgment. Defendants demurred to the evidence, and the Commonwealth having joined therein, the court discharged the jury and gave judgment for the Commonwealth on the demurrer. *Held*, that this was not erroneous.

Writs of error and certiorari are of right. Under the provisions of the Act of 19th May, 1874, in all cases of felonious homicide and such other criminal cases as are triable exclusively in the Oyer and Terminer, writs of error and *certiorari* are of right, and in all other cases may be issued whenever allowed by the Supreme Court or a judge thereof.

Error to the Court of Quarter Sessions of Armstrong County.

This was an indictment of A. Peter Hutchison and W. S. Batchelder for embezzlement and larceny as bailees.

On the 13th of July, 1874, R. L. Bishop, the prosecutor, who was the holder of two orders drawn upon and accepted by the Union Pipe line for 1083 66-100 barrels of crude petroleum, indorsed said orders, and delivered them to the firm of Hutchison & Batchelder, oil dealers, and received from them the following receipt:

" PARKER'S LANDING, PA., July 13th, 1874.

" Received of Mr. R. L. Bishop ten hundred eighty-three 66-100 barrels United oil, pipage unpaid, to be held for storage on the following terms: Five cents a barrel per month, or fifty cents for twelve months.

" HUTCHISON & BATCHELDER."

On the 13th of August, Bishop, having another order drawn upon and accepted in like manner by the Pipe Line Company, for 103 12-100 barrels, indorsed and delivered the same, to Hutchison & Batchelder, who underwrote the above receipt as follows:

" August 13th, 1874, received 103 12-100 barrels, on same terms as above.

H. & B."

At the time of the delivery of these orders the oil mentioned therein was in some of the numerous tanks or miles of pipe of the Union Pipe Line Company, and was wholly undistinguishable from thousands of barrels of other petroleum in the tanks of said company.

After Hutchison & Batchelder had received the accepted orders, they deposited them to their general account with the Pipe Line Company; and were credited with the same upon the books of said company. Against said general account they drew at various times until the spring of 1875, when they became embarrassed, and in meeting their engagements continued to draw until their balance was exhausted; and the firm failed about August, 1875.

In October, 1875, the prosecutor presented his receipts and demanded the 1,186 78-100 barrels of oil, which the defendants were unable to deliver, and on the 9th of November, 1875, Bishop made a criminal information against them, and on the 7th of December following the grand jury returned an indictment.

The first count in substance charged that "the defendants were intrusted by Bishop with said oil to keep in their tank, as trustees and agents under and by virtue of a certain contract in writing, to deliver said oil to Bishop whenever he should demand the same on the payment of storage or tankage; that, being so intrusted, defendants did, by virtue of said trust

agency, receive and take the said oil into their possession; that on the 15th of October and on the 5th of November, 1875, the prosecutor demanded said oil and tendered the amount due for storage or tankage; that defendants, having the said oil in their possession by virtue of the said trust, refused to surrender the same, and did fraudulently embezzle the said oil and convert the same to their use with intent to defraud the said Bishop," etc.

The second count charged that "said defendants, being the agents of Bishop, with the custody and care of said oil, did unlawfully and fraudulently embezzle said oil and convert the same to their own use without the knowledge or consent, and with the intent to defraud said Bishop," etc.

The third count: That, being the bailees of Bishop and as such bailees intrusted with the custody and care of said oil, defendants unlawfully and fraudulently embezzled and converted the same to their own use, etc.

The fourth count: That defendants, being the trustees, agents and bailees of Bishop intrusted, etc., did unlawfully and fraudulently embezzle, etc.

The fifth count: That defendants, being the bailees and agents of Bishop, and as such bailees and agents intrusted, etc., did take, receive and carry away and unlawfully and fraudulently convert said oil to their own use, etc., and feloniously did steal, take and carry away said oil, etc.

On the trial before Boggs, P. J., before the jury were sworn, the counsel of defendants moved to quash the bill of indictment on the following grounds: that the indictment improperly charges distinct offenses, some of which are misdemeanors and others felonies; that none of the counts sufficiently charge defendants with any crime known to the law; that the first and second counts do not sufficiently charge any crime under the 113th and 114th sections of Act of 30th of March, 1860, or the third count with the crime of embezzlement at common law; that the first count does not sufficiently aver the writing creating the alleged trust; that the second does not aver that defendants carried on business as agents; nor the third that defendants are either bankers, brokers, agents, attorneys or merchants, or that they were clerks, servants or employes of Bishop, and that the fourth and fifth counts com-

mingled two separate and distinct offenses, one a misdemeanor and the other a felony.

The motion was refused by the court and the defendants having entered a plea of "not guilty" the trial proceeded.

After the Commonwealth had closed the defendants demurred to her evidence as being insufficient in law to maintain the indictment as to those crimes which are sufficiently charged therein.

The Commonwealth joined in the demurrer, whereupon the court entered judgment as follows:

"On the demurrer and joinder, jury discharged and the court, on due consideration of the issue raised by the demurrer and joinder and the evidence, decide the issue in favor of the Commonwealth and against the defendants, and render judgment in favor of the Commonwealth and against the defendants of guilty in manner and form as they stand indicted, and find from the evidence the property taken and fraudulently converted by the defendants and not restored to be 1,186 78-100 barrels of crude petroleum oil of the value of \$1.40 per barrel, in all of the value of \$1,661.49."

The court afterward sentenced the defendants each to pay a fine of \$5 and be imprisoned in the Allegheny county workhouse for the period of six months, to restore to the owner the property fraudulently taken and converted, or pay the value of the same, or so much thereof as may not be restored, and to pay the costs of prosecution, and be in custody until this sentence is complied with.

The defendants applied for a writ of *certiorari*, the proceedings to stay until the determination of the cause in this court, which was allowed by his Honor Justice WILLIAMS, at Pittsburg.

Having obtained this writ, they assigned for error that the court erred in refusing to quash the indictment; deciding the demurrer in favor of the Commonwealth; entering judgment thereon in the manner the court did; discharging the jury; not submitting to the jury the question of the value of the property alleged to have been taken; finding the value of the property and in the sentence imposed upon defendants.

A writ of error was also taken by defendants, which it appeared, however, had at no time been allowed.

When the cause came on for hearing before the Supreme Court, the Commonwealth's counsel moved to quash both the *certiorari* and the writ of error for the following reasons:

1st. The writ was allowed by Hon. H. W. WILLIAMS, one of the justices of the Supreme Court of Pennsylvania, at chambers in the city of Pittsburg, on the 24th day of February, 1876, while the said Supreme Court was in session in the city of Philadelphia, where alone the application should have been made for the said writ.

2d. The time fixed for the hearing of the case was not in accordance with the Act of Assembly empowering the justices of the Supreme Court to allow writs of error in criminal cases.

3d. There is no provision made by law for reviewing a criminal case determined upon a demurrer in the court below, and therefore neither writ of error nor *certiorari* will lie in this case.

In support of this motion it was contended that no writ of error or *certiorari* would lie under the 57th section of Act of 31st of March, 1860, Purd. Dig. 390, or the Act of 19th of May, 1874, as these acts applied exclusively to homicide cases or where a trial had been had and exceptions were taken and sealed; that no provision was made by any Act of Assembly for a writ of error in a criminal case disposed of in the court below upon a demurrer to evidence, and that as a *certiorari* brought up nothing but the record, and the evidence in the case is no part thereof, it could not be reviewed by this court upon a *certiorari*. That the only mode by which said writs could be had is found in section 59, Act of March 31, 1860, wherein the directions are explicit, that no such writ shall be allowed except within thirty days after sentence and upon special application, which application *shall* be made to the court in banc if sitting in any district; and it is only when the court is not sitting that the application *may* be made to a justice of said court, and whether allowed by the court or a justice thereof the time of hearing shall be fixed not more than thirty days after the allowance of the writ. This court will take notice of its own sessions and it is clear, therefore, that, whilst the court was sitting in Philadelphia, one of the justices of the court had no power to allow

the writ in this case, and for this reason alone the writ should be quashed, but the departure from the Act of Assembly in fixing the time of hearing as well as the fact that a writ of error does not lie in case of a demurrer in a criminal trial are equally causes for quashing the writ.

J. SMULLIN and J. GILPIN, for plaintiff in error.

E. S. GOLDEN and the District Attorney, JEFFERSON REYNOLDS, for the Commonwealth.

By the court, PAXSON, J.

There was a *certiorari* as well as a writ of error in this case. The former was specially allowed by our brother WILLIAMS at chambers. There was no allowance of the writ of error, although issued simultaneously with the *certiorari*. This was evidently an oversight. The Commonwealth moved to quash both writs, and assigned as reasons therefor: 1. Informality in the allowance of the writs, and 2. That neither *certiorari* nor writ of error would lie in the case. The objections are purely formal, and inasmuch as the record presents a proper case for review, we have no hesitation in allowing the writ of error *nunc pro tunc*. The act of the 19th of May, 1874 (Pamph. L. 219), makes ample provision for writs of error and *certiorari* in criminal proceedings. In all cases of felonious homicide and in all such other criminal cases as are triable exclusively in the Oyer and Terminer, said writs are of right. In all other criminal cases they may be issued whenever allowed by this court or a judge thereof.

Upon the trial in the court below a motion was made on behalf of the defendants to quash the bill of indictment. The motion was refused, and this ruling of the court forms the subject of the first seven specifications of error. We are of opinion that the first, third and fourth counts are fatally defective and ought to have been quashed. The first count charges the defendants with embezzlement as "trustees and agents." Here is a blending of two offenses in one count, which is not allowed in criminal pleading. Embezzlement by trustees is one offense; embezzlement by agents is another, and indictable under a different section of the code. Offenses

which are a part of the same transaction may be joined in the same indictment when it is triable in the quarter sessions, even though one of said offenses be a felony: *Hunter v. Commonwealth*, 29 P. F. Smith, 503. This, however, does not justify the joining of separate offenses in one count. The third count charges the defendants with embezzlement as bailees. There is no such offense at common law, nor under the code. The fourth count charges the defendants with embezzlement as "trustees, agents and bailees." This is defective for the reason stated in regard to the first count. The second count is perhaps sufficient in point of law. It charges embezzlement as "agents." It is, however, of no practical importance, as there was no evidence to support it. The defendants were not the "agents" of the prosecutor. This obviates the necessity of any discussion as to whether the defendants were professional agents. This conviction, if sustained at all, must rest solely upon the fifth and last count of the indictment. This count charges the defendants with larceny as bailees. It is true the blunder of joining the words "bailees and agents" is again repeated, but we think with a different result. There is no blending of two or more separate offenses in the one count, as is the case in the first and fourth counts.

There is no section of the code which defines and punishes such an offense as larceny by "agents." Hence, the word "agents" does not introduce another offense into this count, and may be rejected as surplusage. This brings us to the important question in the case, viz.: was the evidence for the Commonwealth sufficient to sustain a conviction of larceny as bailees? The defendants demurred to the evidence, and the district attorney having joined therein, the court discharged the jury and gave judgment for the Commonwealth upon the demurrer. The discharge of the jury is one of the errors assigned. In this we think the court below was right. It is true a jury are not only judges of the facts in a criminal case but they are also judges of the law under the advice and instruction of the court. It was in the power of the defendants to require the jury to pass upon the whole case. But they waived this right by their demurrer to the evidence. By this act they threw the decision of both the law and the facts upon the court, and the discharge of the jury was entirely

proper. They had no further functions to perform: *Commonwealth v. Parr*, 5 W. & S. 345. In the consideration of the question whether the court below was right in adjudging the defendants guilty under the evidence, the first thought that naturally suggests itself is, was there a bailment of the oil? This involves a brief statement of the facts as proved upon the trial and admitted by the demurrer.

On the 13th of July, 1874, R. L. Bishop, the prosecutor, was the owner of 1,083 barrels of crude petroleum. This oil was in the pipes or tanks of the Union Pipe Line, and Mr. Bishop held as the evidence of his title, two accepted orders on said company. On the day above named Mr. Bishop delivered these orders to the firm of Hutchison & Batchelder, the defendants, and took from them the following receipt:

“PARKER'S LANDING, PA., July 13th, 1874.

“Received of Mr. R. L. Bishop ten hundred and eighty-three 66-100 barrels of United oil, pipage unpaid, to be held for storage on the following terms: Five cents a barrel per month, or fifty cents for twelve months.

“HUTCHISON & BATCHELDER.”

On the 13th of August, 1874, the defendants received from the prosecutor 103 12-100 barrels of petroleum, in the same manner and upon the same terms. At the time of the delivery of the said accepted orders, the oil referred to was in the numerous tanks or lines of pipes of the Union Pipe Line Company, and was wholly undistinguishable from the thousands of barrels of other oil in said pipes or tanks. After the defendants received the orders they deposited them to the credit of their general account with the Pipe Line, and thereafter continued to deposit and draw until the spring of 1875, when defendants became financially embarrassed. In order to meet their engagements they continued to draw upon the balances in their favor on the books of the Pipe Line until their failure in August, 1875. When the prosecutor demanded his oil, they were unable to deliver it, for the reason that they had drawn all or nearly all the oil out of the pipes to pay their debts. The case presented by this brief statement, is believed to be without precedent. Of all the numerous cases in the books, I have found no one that resembles it in

all its essential features. If we take the receipt of the defendants as conclusive upon them, it would establish a bailment. But a receipt has never been held to be conclusive even in a civil case. The explanation of it furnished by the evidence in the case discloses substantially the facts above stated. It was contended, on behalf of the defendants, that there was no bailment because there was no separation of the prosecutor's oil from the immense quantity of other oil in the pipes and tanks of the Pipe Line Company, and that as a sequence there was no delivery. This is the vital point in the case. If there was no delivery of the oil there was no bailment. We have a long line of cases in England and this country, involving the question as to how far a sale of goods is complete when the article sold has not been separated from other goods or property of like character. The subject is discussed at considerable length and the authorities reviewed by Mr. Justice ROGERS in *Hutchinson v. Hunter*, 7 Barr, 140. The rule which is there deduced from the authorities is that "the goods sold must be ascertained, designated and separated from the stock or quantity with which they are mixed before the property can pass. Until this be done it remains the property of the vendor, and if destroyed by fire or otherwise, it is the loss of the vendor and not of the vendee." This was undoubtedly the proper rule to apply to the case before the court in *Hutchinson v. Hunter*. The merchandise which had been sold consisted of one hundred barrels of molasses out of a lot of one hundred and twenty-five barrels. The barrels varied in quantity and had not been gauged; were not separated nor marked, nor were any particular barrels agreed upon. The facts brought the case precisely within the rule laid down by Chancellor KENT (2 Com. 496):

"If anything remains to be done between the seller and the buyer before the goods are to be delivered, a present right of property does not attach to the buyer. The goods sold must be ascertained, designated and separated from the stock in quantity, with which they are mixed, before the property can pass. It is a fundamental principle pervading everywhere the doctrine of sales, that if goods be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller until the specific property be separated and identified."

This principle runs through all the cases upon this subject, and is too firmly established to be shaken. Nor are we disposed to question its soundness. If this case can not be distinguished from those to which the rule has heretofore been applied, there was neither a delivery nor a bailment of the oil. An examination of our own as well as the English cases discloses the fact that, as between the vendor and vendee, something remained to be done in order to ascertain the property and render the delivery complete. In *Smyth v. Craig*, 3 W. & S. 14, the rum and molasses were to be gauged and the price fixed at the purchaser's warehouse, an act that was prevented by the vendor's retention of the property in his actual custody. Said retention was held to excuse actual performance, and the property passed. In *Austen v. Craven*, 4 Taunt. 644, the sugar, which was the subject of the contract, required to be weighed in order to ascertain the quantity. So in *Busk v. Davis*, 2 M. & Selw. 397, the quantity of flax to be delivered was to be ascertained by the wharfinger's weighing it (the mats being of unequal quantities, so that a fraction of a mat might be required), and an allowance for the tare and draft was to be made by the weight. In *Zagury v. Furnell*, 2 Campb. 240, there was a sale of 289 bales of goat skins, five dozen in each bale. It appeared that by the usage of trade, it was the duty of the seller of goat skins by bales in this manner, to count them over that it may be seen whether each bale contains the number specified in the contract. Before they were so counted, the skins were destroyed by fire at the wharf where they lay at the time of the sale. It was held by Lord Ellenborough that, as the enumeration of the skins was necessary to ascertain the price, which was an act for the benefit of the seller, and as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and the skins continued at the seller's risk. In *White v. Wilks*, 5 Taunt. 176, there was a sale of twenty tons of oil out of a merchant's stock, consisting of several large quantities of oil in divers cisterns, in divers places. Here the oil had to be weighed and separated. *Whitehouse v. Frost*, 12 East, 614, was also a case of oil, and bears a closer analogy to the case under consideration than any that I have found. There A, having forty tons of oil secured in the same cistern,

sold ten tons to B and received the price. B sold the same to C and took his acceptance of the price at four months, and gave him a written order for delivery on A, who wrote and signed his acceptance on said order, but no actual delivery was made of the ten tons, which continued mixed with the rest in A's cistern. *Held*, that this was a complete delivery in law, of the ten tons by B to C, nothing remaining to be done on the part of the seller, though as between him and A it remained to be measured off; and therefore the seller could not, on the bankruptcy of the buyer before his acceptance became due, countermand the measuring off and delivery in fact to the then buyer. This case was undoubtedly decided against the current of authority. It was questioned in *White v. Wilks*, *supra*, and *Austen v. Craven*, *supra*, and may now be considered as overruled. The oil was sold by the ton. It was necessary, not only to set it apart, but to weigh it. It could not be truly said that one ton was the exact counterpart of any other ton, for the reason stated in the note to *White v. Wilks*, that fluids are affected by a change of temperature; those portions which are most exposed to heat becoming lighter, while those portions not so exposed are correspondingly heavier.

It would be unprofitable to further follow up this line of cases. I have cited enough to show what pervades them all, that something remained to be done as between the vendor and vendee, to ascertain the quantity, quality or price. When nothing of the kind remains to be done, as was said in *Scott v. Wells*, 6 W. & S. 357, the ownership and risk pass by a contract of sale without actual delivery. To the same point is *Rugg v. Minett*, 11 East, 210. But it must be conceded that where something remains to be done by the vendor to separate the goods and to enable the purchaser to get the actual custody and possession, the right of property would not pass and the latter could not maintain an action of trover and conversion upon a refusal to deliver. It is almost needless to say that there could be no bailment where there was neither title nor possession in the bailor. He could make no delivery, and delivery is of the essence of a bailment. It remains to be seen whether the principles of law above referred to are applicable to the facts of this case. We must not make the mistake of applying technical rules of law to

cases for which they were not intended, and to which they have no proper application.

An examination of the facts of this case shows it to differ in many essential features from any of those cited or any of the cognate cases. In the first place it is to be observed that in all of them the property sold was part of a larger quantity belonging to the vendor and in his possession, from which it had not been separated or distinguished. Such was not the case here. The oil, which is the subject of this contention, was not mixed with any other oil of the prosecutor. It required no separation from any other portion of his property. It was not even in his actual custody or possession. He had the constructive possession by virtue of his accepted orders. When therefore he delivered the orders to the defendants there was nothing remaining for him to do to complete the transaction. He had done all in his power to render the delivery complete. The oil was in the pipes of the Pipe Line Company. For the sake of convenience it was poured in and mixed with the oil of other producers, and by the usage of trade each one was entitled to draw out, not the identical oil put in, but oil which is its precise equivalent. In the consideration of the questions involved in this case we can not close our eyes to the total revolution in the manner of doing business which has been brought about by the discovery of petroleum in this State. It has developed a new industry of vast importance. Methods for conducting it have been devised and put in operation which were wholly unknown when the cases I have cited were decided. Instead of oil being hauled a long distance from the well to a market or shipping station and there stored in barrels or in tanks in a merchant's warerooms, it is now turned at once by the producer into the pipes of the Pipe Line Company and thence conducted to the line of the railroad or canal for shipment, or may be held in said pipes or the tanks connected therewith. Each producer knows that his oil is mixed with the oil of other producers. Each barrel of oil in the pipes is the precise counterpart of every other barrel contained therein. It differs neither in quantity, quality nor price. The oil is sold and passes from hand to hand upon the accepted orders or certificates of the Pipe Line Company. And here again there is a marked distinction between this and

any of the cases cited. It was distinctly proved upon the trial that the delivery of the certificates was a delivery of the oil. It was the usage of the trade known to all these parties. It was consequently a part of their contract: *Zagury v. Fennell*, and *Scott v. Wells*, *supra*. The defendants recognized this usage by their receipt. For all the purposes of trade and commerce the delivery of the accepted orders was a delivery of the oil. This is a matter of fact established by the evidence and admitted by the demurrer. Thousands of barrels of oil are sold and delivered daily in the market upon similar orders. No one doubts that the property passes; that the orders draw to them the constructive possession, and that the delivery of said orders is a symbolical delivery of the oil. None of the reasons which required a separation of the oil in the cases cited exists here. It is mixed for the convenience of those dealing with the Pipe Line Company. It is separated by the latter when the holder of the order requires it. By the usage of the trade he accepts the oil as it is drawn from the lines, and receives the precise equivalent in quantity, quality and value. It would seriously embarrass this large and valuable industry were we to hold that in such transactions the delivery of the orders was not a delivery of the oil. How can these defendants allege with reason that as to them there was no delivery when in point of fact they drew the oil out of the pipes and applied it to the payment of their debts? That such was the fact clearly appears from the evidence. If it had not been drawn out it would have been in the pipes still to meet the demand of the prosecutor. Even if the delivery of the orders was not a complete delivery of the oil at the time, such delivery became complete when the defendants drew it out, or enabled others to draw it out by a transfer of the orders. It would render the law contemptible in the eyes of business men, were it to say that there was no delivery of this oil, when as a matter of fact there was a delivery for all the purposes of trade and commerce; such a delivery as enabled the defendants to sell it and apply the proceeds to the payment of their debts.

The principle contended for by the plaintiffs in error rests upon the merest technicality. The tendency of modern legislation, as well as judicial decision, is to do away, as far as

mon law when they interfere with substantial justice. As was observed in *Hunter v. Commonwealth*, 29 P. F. Smith, 503, "The revised criminal code and the criminal procedure act have brushed away many of these unseemly niceties." In each of the sections of the code hereinafter cited, artificial rules have given place to the advancing spirit of practical common sense in our legislation, and defects in the common law, long seen and acknowledged, have been supplied. As evidence of the legislative intent to regard substance rather than mere form, it may not be inappropriate to refer to the 124th section of the Act of 1860, defining the words "trustee" and "property" as used in said act. It is there said that "the word 'property' shall include every description of real and personal property, money, debts and legacies, and all deeds and instruments relating or evidencing the right or title to recover or receive any money or goods, and shall also include not only such property as may have been the original subject of a trust, but any property in which the same may have been converted, and the proceeds thereof respectively, or anything acquired by such proceeds." This language is very comprehensive, and evidently means that an offender shall not shelter himself behind technical rules based upon a change of the character of the property from one species to another.

We do not propose to give any construction to the code not warranted by its terms. But to apply a technical rule of law to a case that is not within its reason nor spirit would be almost as objectionable.

If there was a delivery of the oil, of which we have no doubt, it follows necessarily that there was a bailment. This brings us to the further question whether the defendants fraudulently converted it to their own use. This point is free from difficulty. It is a fraud *per se* for a bailee to convert to his own use the property committed to his care. The conversion is *prima facie* evidence of the fraud. Larceny at common law involves something more. It requires the *animus furandi*. There must be a felonious taking. Not so with larceny as bailee. It requires merely a fraudulent conversion. The 107th, 108th, 109th, 113th, 114th, 115th and 116th sections of the act of 31st of March, 1860, were evidently intended to punish as crimes certain acts

possible, with the subtle and refined distinctions of the common law which at common law were mere breaches of trust. Hence, fraudulent conversions of property by bailees, trustees, clerks, servants, bankers, brokers, attorneys, officers of banks and other corporations, are made criminal offenses by the sections referred to. It is not required by the 108th section that the conversion by a bailee shall be with *intent to defraud*.

The omission of these words is significant; the more so from the fact that they are used in the 113th section relating to trustees, and the 104th section relating to bankers, brokers, attorneys, merchants, and agents. In the case of a bailment, therefore, so far as the intent to defraud may be regarded as of the essence of the crime, it must be presumed from the unlawful conversion. If I deposit my pocket-book for safe-keeping over night with my landlord, and he opens it and converts the contents to his own use, he is a thief both in law and morals. Nor does it matter that he has parted with it to pay his debt under the stress of an execution, with the intention of restoring it to me ultimately. Such a transaction would be transgressive of the 108th section of the Act of 1860, and the conversion would be evidence of the fraud. But it is said that the defendants were bankers in oil, and that the case resembles that of an ordinary banker who receives moneys upon deposit. It is difficult to see the analogy. By the law and the usage of banking, the depositor who makes a general deposit of his money becomes a mere creditor of the banker. The money deposited becomes the property of the banker. He has a right to use it in his legitimate business. He may loan it out to his customers upon such security and upon such terms as are usual with bankers. No such state of facts exists here. The defendants acquired no property in nor right to use the prosecutor's oil. It was deposited with them for storage and safe-keeping only, for which they were to be paid a compensation agreed upon. What right had they to sell it to pay their debts or for any other purpose? That they became embarrassed in their circumstances affords them no justification. They had no right to lay their hands upon the property of the prosecutor confided to them for safe-keeping, in order to relieve themselves. Upon

a careful consideration of the whole case we are of opinion that the learned judge of the court below was right in adjudging that the defendants were guilty of larceny as bailees. The fact that the indictment included other counts which are defective is not material. One good count is sufficient to sustain the sentence: *Commonwealth v. M'Kisson*, 8 S. & R. 420; *Hazen v. Commonwealth*, 11 Harris, 355.

The judgment of the court of Quarter Sessions is affirmed. And it is further ordered that Peter Hutchison and W. S. Batchelder, the plaintiffs in error, be remanded to the custody of the keeper of the Allegheny county workhouse, there to be confined according to law and the sentence of the court below, for the residue of the term to which they were respectively sentenced, and which had not expired on the 23d day of February, 1876, when the writs of error and *certiorari* in this case were lodged in the office of the clerk of the Court of Quarter Sessions; and that the record be remitted to said court with instructions to carry this order into effect.

MERCUR, J., dissented.

Affirmed.

CASTLEBERRY V. THE STATE OF GEORGIA.

(62 Georgia, 442. Supreme Court, 1879.)

A ditch includes its dams. A ditch carrying water for mining operations includes any dam which is essential to maintain the flow of water in the ditch; and to cut down any such dam is to cut the ditch, within the statute making it penal to cut a ditch.

Charging sole corporator, as owner. When a corporate ditch is under the control of one who is the sole corporator in the company the property may be laid and proved as the property of such person.

Pretense of title, without color, as a defense. To justify breaking a ditch in another person's possession under claim of right, a mere assertion of title will not suffice; at least, some apparent or probable right must be proved.

The trial below was on indictment for malicious mischief, at Lumpkin Superior Court, September term, 1878. The facts are stated in the opinion.

M. G. BOYD, for plaintiff in error, cited Code, §§ 742, 753, 4611, 4683; acts of 1872, P. 317.

THOMAS F. GREER, Solicitor-general; W. P. PRICE, for the State.

BLECKLEY, Justice.

The indictment was for a misdemeanor, and was based on section 4623 of the Code, which is in these terms: "If any person or persons shall unlawfully, willfully and maliciously cut, break down, destroy, or in any manner hurt, damage, injure or obstruct, or shall counsel and assist, or advise any person or persons in any manner to hurt, damage, injure, obstruct, break down, or destroy any ditch or ditches, canal or canals, flume or flumes, dam or dams, tunnel or tunnels, made, constructed, erected or used to control and convey water to any mine or mines for mining purposes, or any of the appurtenances to such ditch or ditches, canal or canals, flume or flumes, dam or dams, tunnel or tunnels, belonging or appertaining, such person or persons so offending, shall be liable to be indicted for a misdemeanor, and on conviction, shall be fined or imprisoned, or both, at the discretion of the court." The indictment charged that on a certain day, in the county of Lumpkin, Elisha F. Castleberry did, unlawfully and with force and arms, willfully and maliciously cut, break down, damage, injure and obstruct the mineral ditch or canal of one John A. Parker, upon a certain described lot of land, and that the ditch was made, constructed, erected and used to control and convey water to a gold mine, for mining purposes.

Parker testified that the ditch was in his possession, and that it conveyed water to his mine, and also to another mine that he held by lease; that the water at the former of these gave out, and that on going up the ditch at a certain time to see what was the matter, he found "the dam cut down;" that the defendant was there and said he cut it, saying it was his property, and that he wanted to use the water himself; that witness had been in possession eight or ten years, having gone into possession the first or second year after the war; that witness and his brother had the ditch chartered under the name of Ralston Branch Mining Company; that he after-

ward bought his brother's interest, and was sole owner of the ditch at the time defendant "cut the dam down;" that no damages had ever been assessed for running the ditch through the land, and none tendered or claimed. Another witness testified that he had the ditch cut some two or three or four years before the war, having obtained permission to cut it from Richard Castleberry who, though not in actual possession, was recognized as owner of the land, or claimed it, it being then "in the woods"; that the ditch was not used during the war; that after the war witness gave Parker permission to use it; and that it conveyed water to the mine leased by witness to Parker.

The jury found the defendant guilty. He moved for a new trial on the usual grounds, and for alleged error of the court in charging the jury. His motion was overruled, and on that error is assigned here.

1. The whole charge is not in the record. Two extracts from it are set out in the motion for a new trial.

The first is, "that if the jury find from the evidence that the defendant broke or cut the dam that turned the water in the ditch of John A. Parker, and that Parker was in possession of the ditch, using it for mining purposes, then that was an appurtenance to the ditch or canal, and damaged or interfered with the ditch or canal, the jury would be authorized to find the defendant guilty." This language is somewhat loose and inaccurate, but our belief is that it did not mislead the jury. Its purpose was to instruct the jury on one of the elements of the case, and only one, which was the necessary relation of the dam to the ditch, in order for the defendant's act to be within the terms of the indictment and the statute.

The meaning seems to be that if Parker was in possession of the ditch, using it for mining purposes, and if the dam turned the water into the ditch, and the defendant cut or broke the dam, he thereby damaged the ditch. In other words, that in the case supposed, the cutting or breaking of the dam would be the cutting or breaking of the ditch if it controlled the water. It may be fairly assumed that elsewhere in the charge, the requisite mental concomitants of the defendant's act, namely that the act had to be willful and malicious, as well as unlawful, received attention.

The fragment of the charge we are considering is, moreover, to be construed in the light of the evidence; and that shows beyond question that the defendant's intermeddling with the dam did damage the ditch to the extent of making the water at Parker's mine "give out." It can not be ascertained from the record precisely how the dam was located relatively to the ditch. Most probably, it was a continuation of the lower side of the ditch across the channel of the natural stream, where the ditch and the stream united, and was thus a kind of raised wing projecting from the head of the ditch to the opposite bank of the stream, and serving to arrest the flow of the water along the stream, and force it to enter and pass through the ditch. Whether this conjecture be correct or not, there is every indication in the evidence that the dam was essential, and so related to the ditch as that the water would fail when the dam was down. A ditch to convey water for mining purposes, includes any dam connected therewith which is necessary to maintain the accustomed flow of water into and along the ditch. To cut down any such dam, is to cut, injure and damage the ditch.

2. The second extract from the charge of the court reads thus: "If the jury believe from the evidence that John A. Parker bought the interest of his brother in the Ralston Branch Mining Company and that he is the sole corporator of said company, then the charge in the bill of indictment is good, even if the charge of ownership was required."

Here again the court dealt with but a single element of the case, namely, the correspondence between the evidence and the indictment on the question of title to the ditch. The evidence was clear that John A. Parker, in whom the indictment laid the property, was in possession, and that was enough. The charge of the court was amenable to no valid objection from the defendant, for it is certainly true that where the sole shareholder in a corporation is in actual possession and use of the corporate property, such as a ditch to conduct water for mining purposes, an indictment for injuring such property need not name or refer to the corporation, but may describe the property as belonging to the shareholder as a natural person. His possession and use are sufficient *indicia* of ownership.

3. It was insisted in argument that there could be no conviction, because there had been no payment for the privilege of cutting the ditch, no assessment of damages, nor acquisition of the right of way, etc., in the manner necessary under the charter of the Ralston Branch Mining Company. Acts of 1872, p. 317. Also, that the land belonged to the defendant, and that in interfering with the dam he was dealing with his own property, and that, at all events, he acted under a claim of right. Parker had the ditch in his possession, and had long had it. The evidence does not show that the land belonged to the defendant, or that he was concerned in raising a question as to the non-payment of damages, or the non-acquisition of the right of way. When admitting his interference with the dam, he said it was his, and he wanted to use the water, but he adduced at the trial no evidence of the foundation or of the good faith of his claim. It was not he, but one Richard Castleberry who claimed the land prior to the war, and gave permission for the ditch to be cut. The first we hear of any claim by the defendant was when he avowed his apparent trespass.

To justify cutting down a dam which constitutes a necessary part of a ditch in another person's use and possession a mere assertion of title to the dam, or to the water it controls, or to the ditch, will not suffice; the asserted title, or at least some apparent or probable right, must be proved.

Judgment affirmed.

ADAM SHOLL V. THE PEOPLE.

(93 Illinois, 129. Supreme Court, 1879.)

¹ **Accident in mine—Whose duty to report.** Under section 9 of Ch. 93, Rev. Stat., 1874, relating to mines, as amended by the act of May 11, 1877, the person whose duty it is made to report any accident in any mine or colliery causing loss of life or serious personal injury, to the mine inspector, etc., and upon whom a fine is imposed for neglect of such duty, is the one who has the immediate personal charge of the mine or colliery. The owner and operator of the mine or his agent is not within the penalty, unless he has the personal charge of the mine.

¹ *Wesley Coal Co. v. Healer*, 1 M. R. 68; *Reg v. Bleasdale*, 4 M. R. 177.

Appeal from the Circuit Court of Peoria County, the Hon. JOSEPH W. COCHRAN, Judge, presiding.

HENRY C. FULLER, for appellant.

JAS. K. EDSALL, Attorney General, for the people.

By the Court, SHELDON, J.

This was a prosecution under § 9, Chap. 93, Rev. Stat., 1874, p. 706, as amended by the act of May 11, 1877, Laws, 1877, p. 141, § 9.

The statute provides for an inspection of mines by the county surveyors of each county, who are constituted *ex officio* inspectors of mines within their respective counties. Section 9 provides that whenever loss of life or serious personal injury shall occur, by reason of any accident, in any coal mine or colliery, it shall be the duty of the person having charge of such coal mine or colliery, to report the facts thereof without delay to the mine inspector, etc., and if any person is killed, to notify the coroner; and that the inspector shall immediately go to the scene of the accident, and make suggestions and render assistance, and investigate and ascertain the cause of the accident; and provides that the failure of the person in charge of the coal mine or colliery to give notice to the inspector or coroner as thus required, shall subject such person to a fine, etc.

The question presented is, whether the defendant here was the person having charge of the coal mine, within the meaning of this section of the statute. The suit was for the recovery of a fine under this section.

The evidence bearing upon the point was as follows:

James Sholl sworn and examined: Am a son of defendant. Defendant owns the coal bank and controls it. I am the general manager of the business; receive a salary. Joseph Sholl runs the bank, employs the men, etc. My father owns and operates the mine. Defendant had not been near the bank for six months prior to the explosion. He had been off on a trip to New Orleans, and I know heard nothing about the explosion until several days after it happened.

Question.—Do you know where the defendant was at the time the explosion took place?

The Court.—Oh, well, if the defendant was the owner and general operator he is liable.

This observation of the court was excepted to.

There was previous evidence that Joseph Sholl was in charge of the coal bank at the time of the explosion.

The court gave to the jury the following instruction on the part of the people:

“The jury are instructed that the law makes the person in charge of the mine responsible for neglecting to report an accident, and the meaning of such law is not that such person shall be actually present at such mine, but one who operates the mine and carries on the business is, in the meaning of the law, in charge of such mine, and it is the duty of such person to make the report of any accident occurring in such mine to the mine inspector.”

And refused the following instruction asked for the defendant:

“The jury are also instructed, that the meaning of the phrase ‘person in charge,’ as found in the section of the statute which is in question in this case, means the person who has the immediate personal charge of the mine.”

There are three several preceding penal sections in this act, §§ 4, 5, 6. In each of these it names “the owner or agent” as the person to observe the requirements, and to be subject to the penalties therein mentioned. But section 9, appellant’s counsel urges, has a different object. To comply with it requires immediate action. Therefore, instead of attaching guilt to the “owner or agent” for the neglect to give the notice, the section shifts it to “the person in charge,” thus indicating that the latter person is not the same as the owner, or the one having the mine worked. We concur in this view.

Whenever loss of life or serious personal injury occurs by reason of any accident in or about a coal mine or colliery, it is by this section 9 made the duty of the person having charge of the same to report the facts of the accident without delay to the mine inspector, and if any person is killed to notify the coroner also; and the mine inspector, if he deems it necessary, is to go immediately to the scene of the accident and render

assistance, etc, and to investigate the cause of the accident. This is action which is required immediately upon the happening of the accident.

The owner or the person operating the mine might, and quite likely would be, at the time of such an accident, far away from the place of its occurrence, perhaps in another State or country, so that it would be impossible for him to make and give the immediate report and notice required of the accident. Hence, the duty of taking this immediate action, upon the occurrence of an accident, is not imposed upon the "owner or agent" of the mine, but it is imposed upon "the person in charge" of the coal mine or colliery—the one upon the ground at the time, or presumably so—who would have immediate knowledge of the accident, and would be able to make the immediate report, and give the immediate notice which the statute requires.

Upon such a person the penalty of the statute might well be imposed for failure in this duty of immediate action upon an accident. But it would be unreasonable that the owner operating the mine through the agency of others, and not having the opportunity of knowing of an accident at the time of its occurrence, should be subjected to a penalty for not making immediate report of the facts of the accident.

The 9th section consistently and very properly drops the words, "owner or agent," which had been employed in the preceding §§ 4, 5, and 6, and requires the acts to be done in § 9 to be performed not by the "owner or agent" as in the prior sections, but by the "person in charge," and imposes the penalty for the non-performance on the person in charge, and not upon the owner or agent, as in the other sections.

We are of opinion that the defendant in this case, as shown by the evidence, was not the person in charge of the mine, and so subject to the penalty of this 9th section, within the contemplation of the statute, and that the court erred in giving the instruction it did, and in not giving the one asked for the defendant.

The judgment will be reversed and the cause remanded.

Judgment reversed.

1. A ticket payable *in goods* is not within the penal regulations concerning shin-plasters: *U. S. v. Van Auken*, 96 U. S. 366.

2. Effect of contract, amounting to champerty and maintenance, upon costs and right of recovery: *Hilton v. Woods*, L. R. 4 Eq. 432; *Post MEASURE OF DAMAGES*.

3. Indictment for keeping instruments for manufacturing bogus gold dust: *People v. Page*, 1 Ida. 102.

4. Passing counterfeit gold dust, without intent to defraud, is not an offense: *People v. Sloper*, 1 Ida. 158.

5. Special act for extra police in mining districts of Pennsylvania held constitutional: *Northumberland v. Zimmerman*, 75 Pa. St. 26.

6. Forcible attack on a coal breaker, and burning the same. Held, a destruction by riot, in action on insurance policy: *Lycoming Co. v. Schwenk*, 95 Pa. St. 89; 10 Rep. 704.

7. Conviction for reckless blasting without regard to safety of neighbors: *Reg v. Mutters*, 10 Cox C. C. 6.

8. Conviction for allowing more than eight men to be lowered in the cage at the same time, in violation of rules, made under provisions of British statute: *Howells v. Wynne*, 15 C. B. N. S. 3.

DEAN AND CHAPTER OF ELY V. WARREN.

(2 Atkyns, 189. High Court of Chancery, 1741.)

¹ **Evidence of custom in other mining districts.** The rule of law excluding evidence of custom in neighboring manors has been varied in "mine countries, Derbyshire, etc.," to admit evidence to explain or corroborate the custom of the manor in question, and the same exception was in this case extended, by analogy, to the custom of digging turf.

² **Depositions de bene esse.** Though depositions taken *de bene esse* are irregular, yet at the hearing of the cause it is too late to make objection on that ground.

Tenant at will has no easement to take soil. An occupant who is only a tenant at will can never have a right to take away the soil of the lord.

Injunction to stay waste. This remedy suggested, but not acted upon, by the Chancellor.

The end of the bill was to prevent waste in digging and carrying away the soil in manors that lie in the Levels in Cambridgeshire. Evidence of customs in a neighboring manor, offered to be read, to show the customs of the manor in question.

LORD CHANCELLOR.

It is certainly the rule of law in general that the evidence of neighboring manors shall not be admitted to show the custom of another manor, because every manor is to be governed by its own customs.

But this rule is not so universal as not to be varied in some instances; as in mine countries, Derbyshire, etc., the courts of law have admitted evidence with regard to profits of mines, etc., out of other manors, where they are analogous and familiar, to explain or corroborate the custom of the manor in question. Now, in the present case, there is a great similitude in the manors, because this is a fen country, which is of very large extent, and the nature of fens and marshes throughout England is pretty much the same.

The custom here is to dig up the lord's soil for turf, which

¹ *Barnes v. Mawson*, 1 Maule & S. 77; *Carr v. Benson*, L. R. 3 Ch. App. 524; *Table Mt. Co. v. Stranahan*, 20 Cal. 198, *Post* LOCATION; *King v. Edwards*, 1 Mont. 235: *Post* DISTRICT RULES.

² *Doane v. Glenn*, 21 Wall. 33.

is a very odd custom if applied to any other soil; but fenny and marshy lands are often overflowed and lie buried under water for seven or eight years, and produce no profit at all to the copyholder, and therefore, by way of compensation, when the water is drained and the land improved from the additional soil brought by the floods, the copyholder may be entitled to common of turbary, and this seems to be a plausible pretense for such a right; and therefore the evidence offered by the plaintiff must be read.

Though depositions taken *de bene esse* are irregular, yet at the hearing of the cause it is too late to make the objection for irregularity, but in such case you ought to have moved the court to discharge the order for publication.

The nature of common of turbary is very well known, which is nothing more than such a quantity of turfs as may be sufficient for the house to which the common is appendant; but here the custom is laid not only in the tenants but the occupants, which is a very great absurdity; for an occupant who is no more than a tenant at will, can never have a right to take away the soil of the lord.

The court of exchequer, where there has been an imperfect *modus*, have taken a short method by decreeing the defendant to pay tithes; but this court will not put persons to set forth a custom with so much exactness as is requisite at law, or with so much nicety as the court of exchequer expects.

The custom in this case is so extraordinary that if the evidence had not been very strong in the support of it, I should not have directed an issue to try the custom, but should have decreed an injunction to stay waste in digging up the lord's soil.

Before the act of parliament in 15 Car. 2, ch. 17, for the improvement of the great level of the fens, the lands in question were common, and then they might have taken away turf; but being severed by this act (*vide* sec. 38), and annexed to particular tenements, it might very probably lead the tenants into a mistake, that they had the same right to dig turf after severance as before.

PERLEY ET UX. V. LANGLEY.

(7 New Hamp., 233. B. & W. L. C. 95. Superior Court of Judicature, 1834.)

Custom and prescription distinguished—Profit a prendre. A custom gives a right local to a district or community; prescription is a right attaching to the person or to a particular estate.

Whether rights are held as a custom or as a prescription depends upon whether they are held as a local usage, or, *contra*, as a personal claim, or as dependent on a particular estate.

All rights which may be held under a custom may be held by prescription, but the reverse of this is not true.

A profit in another's land must be established as a prescription by the individual through his ancestors, or a corporation and its predecessors, or as appurtenant to some estate held by the claimant.

¹ **No precedent for custom to take the soil.** There are no authorities that sustain the removal of the soil, or the taking of profits from the soil of another, as a custom.

This was an action of trespass, for breaking and entering the plaintiff's close, and digging up and carrying away one thousand bushels of the plaintiff's soil and earth.

The defendant plead: 1st. That the *locus in quo* was a public, navigable water, called Sandbornton Bay, from which the adjoining inhabitants have ever had, and ought to have, the right to take and carry away sand and earth; on which plea issue was taken to the country.

The defendant further plead that the *locus in quo*, from the time whereof the memory of man runneth not to the contrary, has been a place from which the inhabitants of Meredith Bridge village have had, and ought still to have, the right, liberty, and privilege to take and carry away sand at all times, for the purpose of mixing with clay and mortar, and that the defendant, as an inhabitant of said village, has such right, which he is ready to verify; which plea the plaintiffs demurred to.

The case was transferred to this court, for the determination of the matters in law raised in the second plea.

G. Y. SAWYER, for plaintiffs, argued in support of demurrer:

1. That the plea sets forth substantially either a "custom" or a "prescription."

¹ See cases cited in Mining Digest: Title "Custom."

2. If the former, it is a custom to take a "profit" *in alieno solo*, which all the authorities pronounce a bad custom.

3. If the latter, it should have been pleaded with a *que estate*. These positions are sustained by the following authorities: Co. Lit. 113, B; Bacon's Abridg. 669, Custom, A; *Gateward's Case*, 6 Co. Rep. 60; *Selby v. Robinson*, 2 Term Rep. 758; *Grimstead v. Marlowe*, 4 Term Rep. 717; *Waters v. Lilley*, 4 Pick. 145.

The rule laid down in the authorities is that a mere easement—as a way, a landing-place (*Coolidge v. Learned*, 8 Pick. 505), a right to dry nets (5 Co. Rep. 84)—may be claimed by custom, but a profit *a prendre*, which is an "interest" in the soil, and may be a right to take the products of the soil as a right of common (*Gateward's Case*, *supra*); or a right to take decayed wood (*Selby v. Robinson*, *supra*); or fish (*Waters v. Lilley*, *supra*); or to take a part of the soil itself, as a mine, etc., must be claimed by prescription, and pleaded with a *que estate*.

The right claimed by the plea is to take a part of the soil, and is clearly a profit *a prendre*.

HAZELTON, for the defendant.

UPHAM, J.

The terms *custom* and *prescription* are often used as synonymous. They are alike in this respect—that no custom or prescription can be legal but such as has been used time out of mind (Co. Lit. 110, 113), and they both have their obligation originally from the consent, either express or implied, of the parties who are bound by them. The ordinary forms of pleading a custom and prescription are the same, and the difference betwixt them does not generally depend on the nature of the claim set up. The same rights and privileges which may be claimed as a custom may also be claimed as a prescription. An easement upon another man's land—such as a right of way—a right to turn a plow upon another man's land, or for a fisherman to mend his nets there—a right to have a gateway, or to pass quit of toll—may be sustained as a custom, or as a prescription.

If these rights are common to any manor, district, hundred, parish, or county, as a local right, they are holden as a custom; if the same rights are limited to an individual and his descendants, to a body politic and its successors, or are attached to a particular estate, and are only exercised by those who have the ownership of such estate, they are holden as a prescription, which prescription is either personal in its character, or is a prescription in a *que estate*.

In order, therefore, to determine whether rights are holden as a custom or as a prescription, it is necessary to advert merely to the manner in which they are holden, whether as a local usage, or as a personal claim, or dependent on a particular estate. At the same time, there are certain rights that can be holden but in one way, and as a prescription.

All the rights that can be holden as a custom can be holden as a prescription, but not *vice versa*; and all rights holden as a custom, or as a prescription, are holden *by* prescription; that is, in the sense of the term here used, by usage; but this does not confound the distinction as to the tenure of those rights.

In this case the claim set up is not made as attaching to a person by inheritance, to a corporation, or an estate, but is claimed as a local right in the inhabitants of Meredith Bridge village. The claim is therefore made as a custom; and it becomes material to determine whether such a claim can be by custom.

A distinction has been taken, in all the authorities, betwixt a profit taken from the soil of another, and a mere easement upon the soil. Rights *a prendre*—as the right to taking the herbage of the soil by cattle, a right to take away turf, peat, coal, sand or gravel—can not be alleged as in the inhabitants of a town, and as a local custom. Such a claim must be sustained as a prescription by the individual through his ancestors, or in the name of a corporation and its predecessors, or as appurtenant to some estate holden by the claimant. A mere residence is insufficient. It is not essential that such rights be prescribed for in a *que estate*, as holden in the language of 4 Term Rep. 717; for all rights that can be sustained by prescription can be prescribed for in a man and his ancestors; and rights in gross can be prescribed for only in this manner, and can not be claimed in a *que estate*: 1 Lit. sec.

183; 1 Saund. 346. The inhabitants of a town, as such, or the inhabitants of the ancient houses of a town, can not claim a right of common, or other profit *in alieno solo*, as a custom, for the inhabitants may not have the inheritance: Co. Lit. 113 B; *Gateward's Case*, 6 Co. 60; 2 Cro. 152; 2 Id. 446; Com. Dig. Prescription, H.; Co. Lit. sec. 183, 120 B.; *Mellor v. Spateman*, 1 Saund. 346; *Grimstead v. Marlowe*, 4 D. & E. 717; *Waters v. Lilley*, 4 Pick. 145.

Inhabitants may prescribe for an easement *in alieno solo*, as for a way; for liberty to play at rural sports; to draw nets on another's land; to pass free of toll; for a public landing-place, etc.: Bacon's Abridg. Custom, C; Cro. Eliz. 180; Cro. Car. 419; 13 Petersdorff's Abr. Note, 502; *Fetch v. Rawling*, 2 Hen. Bl. 393; *Millechamp v. Johnson*, Willes, 205; *Coolidge v. Learned*, 8 Pick. 505; *Sargeant v. Ballard*, 9 Pick. 251. But there are no authorities that sustain the removal of the soil, or the taking of profits from the soil of another, as a custom. There is, therefore, no justification for the breaking and entering in this case upon such a plea.

Plea adjudged bad.

1. Forms of interrogatory in proving custom: *Ecker v. Moore*, 2 Pinn. 423; *Post* REPLEVIN.

2. Recitals in ancient deed held evidence of custom. In proof of custom evidence is not confined to things between the parties: *Anglesey v. Hatherton*, 10 M. & W. 218.

3. Custom can not control special contract: *Randolph v. Halden*, 44 Iowa, 327; *Post* LEASE.

4. To what extent local usage can affect mercantile law, see *New York Mine v. Bank*, 1 M. R. 453.

5. General customs enter into a lease—not the usage of lessor unless known to both parties: *Beatty v. Gregory*, 17 Iowa, 109; *Post* LICENSE.

6. Ancient customs of British mining districts: *Arkwright v. Cantrell*, 7 A. & E. 565; *Atty. Gen. v. Jackson*, 5 Hare, 355.

7. Custom to work without leaving support to surface, *held* bad: *Blackett v. Bradley*, 1 B. & S. 940; *Hilton v. Granville*, 5 Q. B. 701.

8. Custom to use surface to sink pits, and land and store coals, without restriction either as to time or place, *held* bad and unreasonable: *Broadbent v. Wilks*, 1 Willes, 360.

9. Custom to wash for tin and pollute the water with tailings, *held* valid: *Carlyon v. Lovering*, 1 H. & N. 784; *Post* TIN STREAMING.

10. Custom to pollute streams with water from coal mines: *Pennsylvania Co. v. Sanderson*, 94 Pa. St. 302; *Post* NUISANCE.

11. Custom to take sand, *held* bad, as there can be no custom to take a

profit *in alieno solo*: *Blewett v. Tregonning*, 3 A. & E. 554. The same as to gravel: *Constable v. Nicholson*, 14 C. B. (N. S.) 230.

12. Custom of smelters to retain royalty for lessors: *Alderson v. Ennor*, 45 Ill. 123; *Post LEASE*.

13. Usage does not require all the evidence essential to prove custom: *Carter v. Philadelphia Coal Co.*, 2 M. R. 293.

14. Customs of miners on Pacific slope considered: *Jennison v. Kirk*, 98 U. S. 453; *Post DITCH*; see *DISTRICT RULES*.

RAMSAY ET AL. V. CHANDLER ET AL.

(3 California, 90. Supreme Court, 1853.)

¹**Nuisance—Mandatory injunction lowering dam.** Where defendants erected a dam which overflowed plaintiff's placer claim with the water of the mill pond: *Held*, a nuisance, and that the proper decree should order a reduction of the dam such number of feet as would remove the overflow, with a perpetual injunction to restrain the raising of the dam above such point.

Appeal by the defendants Chandler et al. from the Eleventh Judicial District.

The complaint sets forth that the plaintiffs are owners of a certain mining claim on the South Fork of American River; and about the 1st of April, 1850, had erected a dam and dug a race sufficient to carry off the water, and leave the bed of the river dry enough to work for gold and for mining purposes; and set forth title, claiming under Winters, Marshall, and others, the admitted owners, who also granted the right to plaintiffs to tear down an old mill-dam, so as to head off the said stream above, and enable plaintiffs to work out the space occupied by the mill pond.

That said defendants, about the 25th June, 1851, erected a dam across the said stream, below said mill, and obstructed the current, so as to throw back the water and overflow the whole claim of plaintiffs, and prevent them from working it from June 25, 1851, to 5th July, to their damage \$3,000; and pray an abatement of the nuisance.

The bill further charges, that defendants are about to erect an addition upon their said dam, which if done will wholly ruin their said claim; that they (defendants) are wholly insolvent; and therefore pray for an injunction to restrain them from raising the said dam. The bill was sworn to by two of the plaintiffs; and the court granted the writ of injunction as prayed for.

The defendants first demurred to the complaint, and then answer and say, that long before the plaintiffs had purchased or established their claim, in June or July, 1850, defendants had contracted with Winters and Marshall, and others, the

¹ *Cole S. M. Co. v. Virginia Co.*, 1 Saw. 470, 686; *Post* INJUNCTION *Mexborough v. Bower*, 2 M. R. 92.

owners, who conveyed to defendants the right to excavate a race on the said South Fork, below Colonna, and to turn said stream from its course, and to erect a dam for that purpose at the point where the dam is at present, and to flow back the water so much as to enable them to work the bed of said river, below said dam, for gold-mining purposes; and for any injury that said mill company might sustain in consequence of the dam, defendants agreed to pay, and are bound to pay, ten per cent. of all gold mined on said claim; and defendants claim a right to flow back the water, under the said contract, as far as necessary to enable them to drain and work the bed of said river. They also claim by priority of location, and pray a dissolution of the injunction, etc.

The cause was submitted to the court without a jury.

Both parties claimed under the same company, called "The Colonna Saw-mill Company," of which Winters and Marshall are members.

Plaintiffs proved, that in December, 1851, they purchased of said company their entire right to the mill (except the house and machinery), mill-dam, the mining claim described in the bill, the water privileges of said company, the right to tear away the dam, to cut a race for the purpose of draining the bed of the river for mining purposes, and raising a dam at the head of the race for diverting the water, for which they paid \$7,500 down, and were to pay five per cent. out of all the gold taken from the said claim; and that plaintiffs took possession immediately after said purchase, and expended thereon labor and money to the amount of forty or fifty thousand dollars. To the introduction of this testimony defendants objected. The court overruled the objection, and defendants excepted.

Plaintiffs further proved, that about the 25th June, 1851, they had completed their race, and had turned the water of the river into it, by means of a dam at the head thereof, and had drained the bed for mining purposes, and were proceeding to take from said dam large quantities of gold, when the defendants erected a dam about eight feet high across the said river, and flowed the said river back on the mill-wheel to the depth of two or three feet, and on the plaintiffs' claim to the same depth, and prevented the plaintiffs from working the

same; that plaintiffs had one hundred men at the time, who were prevented from working by the back-water, from the 25th June until the trial, and that labor was worth from four to five dollars per day.

Defendants read in evidence certain articles of agreement, made with the mill company on the 17th June, 1850, authorizing defendants to cut a race or canal across a neck of the mill company's land, near the said mine, so as to lay bare the bed of the said river for mining purposes. That they commenced immediately after the date of the articles on the tunnel, and in November on the dam, which in March, 1851, was raised to its present height; a part of the dam was washed away, and was replaced shortly before this suit was brought, and is no higher than is necessary to turn the water into the tunnel as the same is now constructed.

Plaintiffs proved that the mill was in operation at the time the agreement was made between the mill company and defendants, and making from six to eight hundred dollars per day.

They also proved that there was about twenty-two feet fall from where the water enters the tunnel to where it is discharged, the principal portion of which was at the lower end; that the tunnel could have been cut deeper some two or three feet, but at a large expense, as the floor was granite. It was also proved that the tunnel might have been made wider at the upper end, and of the same depth, without very great expense, and if enlarged either way, the water might be carried off without flooding plaintiffs' dam and pool.

The court found that defendants had trespassed on plaintiffs' rights by throwing back the water upon their mining claims to the depth of two feet, and ordered that the plaintiffs, within ten days, reduce the water to the same extent, and in the manner least injurious to defendants' dam; and that the injunction issued be perpetual, and that defendants be forever enjoined from constructing any impediment in the river, so as to raise the water above the point to which it is directed to be reduced by this judgment.

No briefs are on file.

HEYDENFELDT, Justice, delivered the opinion of the court.
WELLS, Justice, concurred.

No points have been filed in this case by the counsel on either side, and we have had to examine it without such aid.

It is a bill in chancery for the abatement of a mill-dam. In the decisions of the court below upon the admission of evidence I can see no error.

The decree of the court requires a diminution of the defendants' dam to the extent of two feet. The only evidence on the question of injury shows that the plaintiffs' claim was overflowed two or three feet. The right is clearly with the plaintiffs, and so the district judge found. The decree should have ordered such a diminution of the defendants' erection as would have prevented any overflow, from that cause, of the plaintiffs' mining ground, or if necessary, an entire abatement.

I do not think the decree has gone beyond what is clearly warranted by the evidence.

Judgment affirmed, with costs.

RUPLEY V. WELCH ET AL.

(23 California, 452. Supreme Court, 1863.)

¹ **Injunction restraining diversion of water.** R. was in possession of a tract of public land on which was a garden and fruit trees, and for the purpose of irrigating them, he constructed a reservoir to receive the water flowing down a ravine on the premises. W. entered upon the premises, and began digging and sluicing for mining purposes, and threatened to divert the water from the reservoir. *Held*, that R. had a vested right in the water by virtue of his prior appropriation, and that the diversion of the water from the reservoir should be restrained by injunction.

² **Mining under crops—California statute allowing miners to enter on agricultural claims.** The laws of California provide that the possession of public land, containing mines of precious metals, for agricultural purposes, should not preclude the working of such mines by any person desiring to do so, but that such person should give to the occupant a bond of indemnity for any damage which might be sustained by the destruction of growing crops. *Held*, that this law is not liable to any constitutional objection, and a miner who, having first tendered the required bond, enters upon land upon which are growing crops,

¹ *Derry v. Ross*, 1 M. R. 1.

² See like Statute, § 1799, Gen. Laws of Colorado.

and begins mining operations, can not be treated as a trespasser, but he is liable for the damages occasioned thereby.

^a **Prior appropriation of water for irrigation.** The right to mine under land occupied for agricultural purposes does not give the right to take the water already appropriated by the surface occupant by his irrigating ditch.

Appeal from the District Court, Eleventh Judicial District, El Dorado County.

This action was commenced on the thirtieth day of November, 1860. The reservoir of the plaintiff was constructed across the bed of the ravine, and defendants were digging and sluicing immediately above the reservoir, and had excavated a ditch, by which they had diverted the water from the reservoir. The other facts are stated in the opinion of the court.

HUME & SLOSS, for appellants.

McCALLUM & UPTON, for respondent.

Opinion by the Court, CROCKER, J.; NORTON, J., concurring.

This action is brought by the plaintiff to recover damages of the defendants, for entering upon certain inclosed premises, and digging up and sluicing the same, for mining purposes; and for an injunction to restrain them from continuing these mining operations.

The premises are described in the complaint as a field of ten acres, inclosed with a rail fence, part of a larger tract in the plaintiff's possession, on which ten acres were growing crops of grain, consisting of barley, wheat, Chile and red clover, and other grasses of natural and planted growth. The plaintiff also avers, that near the place where the defendants are at work, he has a garden and fruit trees, and for the purpose of irrigating them, he constructed a reservoir to receive the water flowing down a ravine on the premises in question; and that the works of the defendants will divert the water from the reservoir, and render it useless for the purpose of irrigating the garden and fruit trees. It does not clearly appear where the reservoir is located, but the inference, from the mode of stating, is, that the reservoir, and the garden and fruit trees,

^a *Irwin v. Phillips*, 5 Cal. 140; *Post* WATER.

are not on the ten acres. The plaintiff also avers, that he has suffered damages to the amount of two hundred dollars, from these acts of the defendants.

The answer directly admits some of these allegations, and the residue are to be taken as true, because the complaint is verified; and the answer only controverts them by a general, instead of a specific denial of each allegation: Civil Pr. Act, 48, 65.

But the answer sets up, as affirmative matter of defense, that the premises are public lands, and only held by the plaintiff by a possessory title, under the act entitled "An Act prescribing the mode of Maintaining and Defending Possessory Actions on Public Lands in this State," passed April 20, 1852; that they contained mines of precious metals; and that the defendants entered upon them for mining purposes; and that before making such entry they offered to execute to the plaintiff their bond with good and sufficient surety, in accordance with the provisions of an act entitled "An Act to protect Owners of Growing Crops, Buildings, and other Improvements in the Mining Districts of this State," approved April 25, 1855; and that the plaintiff refused to accept the same; and they aver that they are now ready and willing to execute such bond, in accordance with the statute of 1855, aforesaid. These allegations of the answer are also to be taken as true, because they are not controverted by the replication: Civil Prac. Act, Sec. 65. A judgment was rendered in favor of the defendants, from which the plaintiff has appealed.

The main question involved in this case is the validity of the act of April 25, 1855; the defendants claiming that, having complied with the provisions of that act, they lawfully entered upon plaintiff's land, and were authorized to commit the acts complained of. The threatened diversion of water from plaintiff's reservoir is a clear violation of a vested right of property, acquired by the plaintiff by virtue of his prior appropriation of the water, and of which he can not be divested for any private purposes or for the benefit of a few private individuals.

But the injury to the growing crops presents a different question. The statute of 1852 relating to possessory actions,

provides that the possession of public land, containing mines of the precious metals, for agriculture and grazing purposes, shall not preclude the working of such mines by any person desiring to do so. The cultivation of the land, and raising crops of grain or grass, is a use of the land purely for agricultural and grazing purposes, and therefore clearly comes within the proviso of the act. The plaintiff's possession of the land was subject to this right of any person to enter upon the land, and work the mines of the precious metals thereon. This right of the miner has been fully recognized by this court, but it has invariably been held to apply only to the possession of public lands held purely for agricultural and grazing purposes, and not extended beyond them: 5 Cal. 36, 97, 308, 395; 14 Id. 380.

The act of April 25, 1855, provides that whenever any person shall, for mining purposes, desire to occupy or use any mineral lands then occupied by growing crops, etc., such person shall first give bond to the owner of the growing crop, etc., that the obligor shall pay to the obligee any damage sustained by reason of the destruction of the growing crops, etc., of the obligee. So far as this act relates to "growing crops," such as are usually raised upon lands used exclusively for agricultural or grazing purposes, it merely regulates a right previously vested in the miner, and to which the plaintiff's possession was subject; and to that extent, it is not liable to any constitutional objection. The right reserved to the miner, by the act of 1852, is subject to such regulations and restrictions as the legislature may see fit to impose; and the act of 1855 is but a regulation of that right, requiring a bond to be given before it can be exercised. The defendants in this case complied with the requirements of the act of 1855, so far as they could, by offering to give the proper bond, which the plaintiff refused to receive. This was all that the defendants were required to do, before entering upon the premises. They could not tender such a bond as the act requires, because the law requires the sum to be fixed by three disinterested persons, one of whom was to be selected by the plaintiff; and this he refused to do, by refusing to receive any bond. The entry of the defendants upon the land upon which the growing crops were, for mining purposes, was therefore lawful, and

can not properly be treated as a trespass. They are, however, liable for the damage to the growing crops caused by their acts; and if the plaintiff should demand of them the bond required by the statute, or they should refuse to pay the damages thus caused by them, they might then be restrained from all further working or trespassing upon the land. But no such case is presented by the record in this action.

It follows, from these views, that the court below erred in refusing the injunction against injuring the plaintiff's reservoir or diverting water therefrom.

The judgment is therefore reversed, and the cause remanded for further proceedings.

Reversed.

THE OREGON IRON CO. V. TRULLINGER.

(3 Oregon, 1. Circuit Court, 1867.)

Deed of water, below mill. A deed granting the right "to flow back the water to the foot of the present overshot wheel of the mill, and to use all the water which naturally flows below said mill." *Held*, to mean the water as it flows from the mill, after use by the mill.

Res gestæ; visible servitudes. To give effect to all parts of the instrument the surrounding circumstances, within the knowledge of the parties, must be considered; the references to the mill show an intent to allow its use to continue, and a purchaser must take with reference to all servitudes visibly attached at the time of sale.

Detention exercised with reference to rights of lower proprietors. The right to use necessarily implies the right to detain, not to divert, the water; and this detention must be reasonable, and be exercised with reference to and in aid of the grant made to the lower mill.

It appears by the pleadings, that on the twenty-sixth of January, 1864, the defendant was owner of the land over which Sucker Creek flows, from Sucker Lake to the Wallamet River, and had then a mill and dam in use on said stream, a short distance below Sucker Lake.

It was admitted on the argument, that defendant's mill was propelled by a large breast-wheel, upon which water was then and is now discharged at different elevations, according to the stage of water and condition of the reservoir, ranging from seven feet above the natural surface of the lake, downward.

The defendant's dam was so situated as to be capable of

raising Sucker Lake seven feet above its natural surface, thus creating a reservoir of eight or ten hundred acres. And the condition and construction of the defendant's mill was such that it could be properly worked when the water of the lake was drawn down to a point one or two feet above the natural surface of the lake; and the defendant's flume was so constructed that the water could be drawn down to that point. There was fall enough in the creek for another water power "below the foot of the defendant's wheel."

On that day, the twenty-sixth of January, 1864, the defendant sold to H. D. Green, the plaintiff's grantor, a parcel of land lying on the creek, near its mouth and below the defendant's mill, and a right of water.

The deed executed by the defendant to H. D. Green recites that said Green "contemplates erecting stacks, furnaces and machinery for the purposes of reducing iron and other ores, for which he desired the use of the waters of the creek." These stacks, furnaces and machinery are now erected at a cost of \$100,000, or more, and belong to the plaintiff, and the machinery is propelled by the waters of the creek, the plaintiff having a dam and reservoir capable of retaining water sufficient to drive that machinery twenty-four hours, though the defendant's gates be closed. This dam does not back water so far as to the foot of the defendant's wheel. This deed conveys to Green a parcel of land near the mouth of the creek, and below the defendant's dam and mill, and it conveys the right to the water, in the following terms: "Together with all the water privilege on Sucker Creek, the outlet of Sucker Lake, which can be obtained by building a dam above the land sold, as above stated, and below the" * * * * (defendant's) "mill at a point to be selected by the said Green, his heirs and assigns, he having the right, which is hereby granted, to construct and maintain a dam of any length and height, and to flow back the water to the foot of the present overshot wheel of the mill, and the right at all times to use all the water which naturally flows below said mill in said stream, unobstructed by the parties of the first part, their heirs and assigns."

It appears from the proofs and admissions, that the creek is, in the dry season, but a small stream, which, in its natural

condition is, for a short portion of the year, insufficient, to drive either the mill of the defendant, or the machinery of the plaintiff. And that by means of using the lake as a reservoir, and retaining water during the wet season, which would be of no use at that time in propelling the machinery of either party, the value and usefulness of the stream to both parties is greatly enhanced, but that the quantity thus saved was not sufficient to fully supply either party during the last dry season. That the natural flow of the stream is liable to become too small for either, by the heat and drouth of summer, and also by hard freezing in the winter.

The plaintiff complains that during the dry weather of the past summer, the defendant has ponded the water back so as to render it impossible for the plaintiff to operate his machinery, and that the defendant has let the water down from his gates at irregular intervals and in irregular and improper quantities, causing unnecessary waste of the water and interruption to the plaintiff's business of smelting ores.

The plaintiff also claims that by the construction of the deed, the defendant had no right to pond the water of Sucker Creek; but that the plaintiff has a right that it should flow at all times, as in a state of nature, to the plaintiff's reservoir without being stopped or ponded by the defendant. The plaintiff also claims that the defendant is threatening to build his dam higher than it was at the time of executing the deed to Green, and thus to further obstruct the flow of the water.

The evidence showed that the value of the water power to each of the parties was greatly enhanced by ponding Sucker Lake, and would be nearly worthless without it; that in dry weather the stream afforded but three to four inches of water under pressure of thirty feet; that at the date of the deed the defendant's mill required and used from thirty to sixty inches of water under thirty feet pressure; that the water required to run the defendant's mill ten hours, will run the plaintiff's machinery twenty-four hours; that the defendant's mill used at that time twenty-five cubic feet per second; that running the defendant's mill twelve hours, in times of low water, will draw down the lake three fourths of an inch; that the lake, when fully ponded, is of capacity, together with the natural flow of water into it, to run the defendant's mill twelve hours

a day for ten months, and that the water can be drawn down each dry season several feet without serious loss to the defendant; that during the years in which the mill has been operated, working the mill has never required the pond to be drawn down more than two feet.

LOGAN & SHATTUCK, for the plaintiff.

MITCHELL & DOLPH, for the defendant.

UPTON, J.

The principal question in this case arises upon the construction of the deed from the defendant to Green, in determining what rights and privileges were conveyed.

If no reference had been made to the mill or dam, the language of the deed might be construed to convey a right to all the power afforded by the natural flow at all times. But reference in the deed to the defendant's mill-dam and wheel, confines the right to flow back the water to particular limits. And I think, upon the same principle and with equal certainty, the reference to defendant's mill and wheel limits the purchase, and reserves to the plaintiff rights that otherwise would have passed. The instrument, taken as a whole, shows the intention of the parties to have been, that the defendant should retain such right in the water as was necessary to a reasonable use of his mill. It is a pertinent matter, that the deed discloses on its face the intended use of the water by each party. What might or might not be a reasonable use of the water by the defendant may depend very much upon the purposes to which it is to be applied by those occupying below him, especially since that purpose is expressed in the deed. Thus, if the contemplated business below required that the plaintiff be constantly supplied with a small stream and there was no possibility of constructing reservoirs by the plaintiff to equalize the flow coming from the mill, the defendant might, in a time of scarcity, be obliged to desist from interrupting the flow, on the principle that one may not so use even his own property as to unreasonably discommode others.

The words, "The right at all times to use all the water which naturally flows below said mill," if they stood alone, might be of doubtful construction, and the whole sentence in

which they occur, taken independently of the rest of the instrument, might, without much violence or strictness, be construed to convey an absolute right to have the water flow at all seasons of the year and at all hours of the day, in the precise quantity it would have flowed in a state of nature.

But it is necessary to give consideration to all parts of the instrument, in order to ascertain what was really the intent of the parties: *Marvin v. Stone*, 2 Cow. 781. For this purpose, the surrounding circumstances within the knowledge of the parties at the time should be considered: *Blossom v. Griffin*, 13 N. Y. 569. It will be presumed that the parties were contracting with knowledge of the situation of the property; and it is evident that they did not intend to abandon the advantages derived from using the lake as a reservoir. The terms of the contract exclude the idea that the defendant was expected to abandon the use of his mill; but it seems to have been contemplated that the defendant could and would so use his mill that the flow of water below it would supply the requirements of the purchaser's business, whenever there was sufficient water. It is admitted that the plaintiff has a reservoir of sufficient capacity; that if, during each day, the defendant lets down sufficient water for the twenty-four hours, the plaintiff can retain and use it without being injured because of temporary interruption of the flow of the stream. Accordingly, if the defendant lets down water at regular intervals in quantities such as the plaintiff is entitled to, no harm can be done by the daily closing of the gates. But the plaintiff claims that by the words, "water which naturally flows," the plaintiff became entitled to all the water that would have flowed there in a state of nature; that the defendant's ponding up the water may increase the evaporation and diminish the stream. I think that construction is not a necessary import of the words used. There is something other than a state of nature contemplated and expressed when we add to the words, "the water which naturally flows," the words, "*below the mill.*" There is a difference between a grant of the "quantity of water that would flow in a state of nature" and "the quantity which naturally flows below a mill."

Had the defendant sold all the land he owned below "the foot of the wheel" down to the Wallamet River, with all its

hereditaments and appurtenances, I think the purchaser would have acquired all the rights that are conveyed by this deed. But in that case the purchaser would have taken subject to all the burdens and servitudes connected with the use of the grantor's mill.

"The purchaser of part of an estate takes it with the servitudes that are visibly attached at the time of the sale": *Lampman v. Milks*, 21 N. Y. 505.

But it seems too evident, from the terms of the contract, that the parties intended a continuation of the use of defendant's mill to admit of argument. The purchaser evidently took the property subject to a right in the defendant to make such use of the lake as had been theretofore made, if not seriously detrimental to the purchaser.

And if there had been no relation of grantor and grantee, the owner of the lands above would have a right to construct a dam, and to make use of surplus water to fill the pond when the detention would not work actual injury or damage to his neighbor. "The right to use necessarily implies the right to dam and to detain the water": *Van Hoesen v. Coventry*, 10 Barb. 520. "While each proprietor has a right to detain the water as it passes through his land long enough for the proper and profitable enjoyment of it; he can only *detain* it. he can not *divert* it: *Platt v. Johnson*, 15 John. 213, 218.

He must not detain it, "unreasonably, or let it off in unusual quantities to the annoyance of his neighbor": 3 Kent's Com. 440; *Webb v. The Portland M. Co.*, 3 Sumner, 189.

What an unreasonable detention is, in general, a question of fact. I think it is not an unreasonable detention to fill the defendant's pond in the wet season with surplus water, that could not then be available to the plaintiff, and to discharge it in the dry season, in proper quantities, when its flow must necessarily be advantageous to the plaintiff. By unavoidable construction of the contract, the defendant has a right to use his mill, and the rule is that he must so use his property as not to injure others. He has a right at proper times to detain the surplus water by ponding the lake. I think he has by his deed limited himself to such times; and that he has no right to accumulate and retain water at times when it is needed for the use of plaintiff's works. I think he may at all

times retain the water at the height at which it had been constantly retained, as indicated by the dam and flume up to the time of Green's purchase; namely, at the height of one foot above the surface of the lake; both because that was the condition of things at the time the purchase was made, and because it does not appear that such detention would make the flow of the stream, at any time of scarcity of water, materially less than it would have been had no dam been built. The plaintiff is entitled in low water to have sufficient water to drive the machinery, etc., mentioned in the deed, if the natural flow of the stream, together with surplus water used in running the mill, would produce so much, and if it would not, then so much as the natural flow of the stream would produce, and the defendant has no right to use his dam or gates as to prevent this. This amount of water should be supplied at such intervals or with such constancy as to enable the plaintiff, by means of his reservoir, to have the regular use of it.

Decree afterward affirmed with amendment fixing the water line more accurately than it had been fixed below.

THE NEVADA WATER COMPANY V. POWELL ET AL.

(34 California, 109. Supreme Court, 1867.)

¹ **Right to raise dam, as affected by rights of intervening claimants above.** Where a party has appropriated the waters of a stream for ditch purposes by means of a dam, and afterward the stream becomes so filled with tailings from workings above, that it becomes necessary to raise the dam to secure the water, it does not follow, that he has the right so to raise the dam because of such unforeseen changes in the condition of the stream.

Idem. If such further act of appropriation cause injury to intervening appropriations, such intervening appropriations must be considered as prior thereto; the party attempting to raise such dam can not do so upon the ground of its being a necessity, in order to secure only the full extent of his original appropriation.

Idem. The appropriation carried with it the right to erect all works necessary to the enjoyment of the water; but that appropriation being complete and acted on, subsequent locations could be made by others based upon the extent of that established appropriation, "unless there was something which manifested a further right."

¹ *Sims v. Smith*, 7 Cal. 148; *Post* RIPARIAN RIGHTS.

Extent of appropriation—Question for jury. The extent of the right acquired by an act of appropriation, or the extent to which subsequent acts of appropriation are subordinate to it, is a question of fact for the jury.

¹ **Surplus water—Subsequent appropriators.** Subsequent locators may appropriate the surplus waters of a stream left after a prior appropriation, and when the rights of such subsequent appropriators once attach, the prior appropriator can not encroach upon them by extending his appropriation; nor can he enlarge his ditch or dam so as to retain what he originally appropriated, if through intervening accidents (as the filling of the stream-bed with tailings) such enlargement would interfere with such intervening rights. In such a case when a right has once vested in the subsequent appropriator, the prior appropriator would be no more justified in extending his claim, or changing the means of appropriation, to the prejudice of the second appropriator, than the latter would be in encroaching upon the prior rights of the first.

Appeal from the District Court, Fourteenth Judicial District, Nevada County.

In the court below the plaintiff had judgment. The defendants moved for a new trial, which was denied by the court, and from the order denying said motion and the judgment the defendants appealed.

The following instructions were given by the court to the jury, at plaintiff's request, to which the defendant at the time duly excepted, to wit:

"1. If the jury believe, from the evidence, that the right of plaintiff to use and divert the waters of Shady Creek is prior in date to the rights of defendants to work the Wilder Claims, such prior right carries with it the right to construct such works as are absolutely necessary to the full enjoyment of the right.

"2. If the plaintiff, or those under whom it claims title, located the Shady Creek Ditch, and diverted any portion of the waters of Shady Creek therein, prior to the location of the Wilder Claims by the defendants, or those under whom they claim, and subsequently, by reason of obstructions caused by tailings coming down the stream from mining claims above, it became necessary for the plaintiff to raise their head dam to its present height, in order to divert the said water into their ditch, then the plaintiff had a right to so raise its head dam, notwithstanding any damage caused thereby to the Wilder Claims.

¹ *Smith v. O'Hara*, 1 M. R. 671.

"3. If the jury believe from the evidence that the Shady Creek Ditch of plaintiff was located, and any portion of the water of the stream diverted therein prior to the location of the Wilder Claims, and that the raising of the dam to its present height was rendered necessary for the purpose of diverting said water into their ditch, by reason of tailings coming down said stream from mining claims of other parties above said dam, then the jury should find for the plaintiff, and assess such damages as may have been proven.

"5. A party can not justify the cutting of a dam upon the ground that he was abating a nuisance, by showing that at some time prior to such cutting the dam caused him an injury, but he must show either that such dam was causing him an injury at the time when such cutting took place, or that, if allowed to remain, it would cause him an injury at some subsequent time."

The other facts are sufficiently stated in the opinion of the court.

D. BELDEN and A. A. SARGENT, for appellants.

The court, in effect, instructed the jury that the prior appropriator of the waters of a stream could add to, enlarge or extend the means by which his water was originally diverted, to the destruction of all subsequently acquired rights; and that, in fact, all other and subsequently acquired privileges were by sufferance of this primal right.

For a reversal of this ruling we rely upon the maxim *sic utere tuo, ut alienum non lædas*. By the ruling of the learned judge, not only the maxim itself was abrogated, but a principle asserted subversive equally of individual rights and of the soundest doctrines of both law and equity: *Bush v. Brainerd*, 1 Cowen, 78; *Hay v. The Cohoes Company*, 2 Comst. 161; *Ferrera v. Knipe*, 28 Cal. 344; *Hill v. Smith*, 27 Cal. 481; *Logan v. Driscoll*, 19 Cal. 626; *Kidd v. Laird*, 15 Cal. 161; *Farrand v. Marshall*, 17 Barb. 385.

In no class of cases has this rule been more frequently applied than where, as in the case at bar, a riparian proprietor, by change in the use of his water right, affects injuriously his neighbor's property: Angell on Water-courses, Secs. 330, 342.

In *Belknap v. Trimble*, 3 Paige Ch. 605, it is held that the use and mode of using water must not be varied to the prejudice of others. See also, *Platt v. Johnson*, 15 Johns. 217; *Thomas v. Brackney*, 17 Barb. 657; *Stiles v. Hooper*, 7 Cow. 267; *Russell v. Scott*, 9 Cow. 279; *Simmons v. Tilston*, 7 Pick. 203; *Robinson v. New York and Erie Railroad Company*, 27 Barb. 522.

Such are but a few of the many cases in which this principle has been recognized and applied, and its applicability to this State and to the peculiar tenure by which water rights are here held, was asserted in *Hill v. Smith*, 27 Cal. 482, with marked emphasis. See, also, *Ramsay v. Chandler*, 3 Cal. 93; *Sims v. Smith*, 7 Cal. 150; *O'Keefe v. Cunningham*, 9 Cal. 591; *Jones v. Jackson*, 9 Cal. 244.

A party may change the point of diversion of water into his ditch, but not to the prejudice of others: *Kidd v. Laird*, 15 Cal. 180. Such change may be made, but not to the prejudice of subsequent appropriators; *Butte T. M. Co. v. Morgan*, 19 Cal. 616.

A. C. NILES, for respondent.

We propose to discuss the general principle announced in the instructions given at plaintiff's request, viz.: That a party who first appropriates and diverts the water of a stream for mining purposes, thereby acquires the right to construct such works as are necessary to divert and use such water; and if damage results thereby to mining claims subsequently located, it is *damnum absque injuria*.

We shall certainly not take issue with appellants' counsel upon the validity of the maxim, *sic utere tuo, ut alienum non lædas*; but they have evidently mistaken the true meaning of the maxim. There is no rule of law or legal maxim which requires a person to so use his property as not to *damage* the property of another. The word *lædas* imports more than *damage*; it imports *injury*. (Notes to *Ashby v. White*, 1 Smith's Lead. Cas. 361.)

Undoubtedly we have no right to raise our dam so as to injure the mining claims of defendants. But injury means damage accompanied by wrong, as resulting from careless-

ness, negligence, etc. The words are sometimes used indiscriminately by the courts, but never when the distinction is required to be drawn. That the raise of the dam resulted in damage to defendant's claims, we of course admit for the purposes of the argument. But the only question is, whether this result was an injury, or damage without injury.

We think the counsel for appellants have mistaken the nature of the property owned by the plaintiff, and the nature of the injuries complained of by us. In our complaint we aver the right to the use of certain waters of Shady Creek, and the interruption of that use by the defendants. The ditch and dam were mentioned only as the corporeal means by which our right to the use of the water was acquired and exercised. The only damage charged was the deprivation of the use of the water. The cutting of the dam was alleged as the means by which we were so deprived of the water. Now, what was it that we acquired by our original location and diversion of the waters of Shady Creek? It was certainly not the right to use and maintain the particular dam that was first erected in 1850, or that erected at any subsequent date. A dam might or might not be necessary to enable us to divert the water. The substantial right we acquired was to divert a certain amount of the water of the stream for mining purposes, and to use the means necessary to divert it. If any change occurs in the bed of the stream from natural causes, or otherwise, but not through any act of ours, our right to the use of the water is unimpaired.

Our right being prior to the location of defendant's claims, these claims were located, subject at all times, not to our right to the use of a dam of a particular height, but to our right to divert the water by such means as might be necessary.

We admit the binding force of the decision in *Hill v. Smith*, 27 Cal. 482, cited by appellants: "The reasons which constitute the groundwork of the common law upon this subject remain undisturbed." But "the conditions to which we are called to apply them are changed." We are to apply the *reasons* of these rules to an altered condition of things—not the strict letter of the rules, which may be inapplicable. For instance, in the enforcement of this rule, the courts of

sister States, concurring with the common law, have held that a riparian proprietor has no right to entirely divert the water of a stream, but has a right only to its impetus, or use while passing over his land. This is only a particular application of the rule under the conditions there existing. But here the ordinary use of water in the mining region requires its absolute diversion from the stream. Will it be contended that there is not a change in the application of the rule in this respect? The court in *Hill v. Smith*, say there is. Yet, while the court rejects the eastern application of the maxim, it, none the less, applies the reason of it to the state of things here existing. In *Hill v. Smith* this court took notice of the well-known fact that ditch owners require water for a use that necessitates its diversion from the stream, and so declare the old rule forbidding its diversion inapplicable. The court is just as much bound to take notice of the fact, equally as well known, that the bed of all the streams in the mining region of this State is mining ground; that it is liable at all times to be located and worked as such, and that the inevitable result of such work is to send refuse and tailings down the stream, and fill and cover the dams and claims below. And in the application of the maxim *sic utere*, etc., to this condition of things, it is equally bound to say that a party who, by prior appropriation of a certain amount of water, has acquired a right to its use, shall not be deprived of his right by such unavoidable change in the bed of the stream. And a subsequent locator of claims above or below is also bound to take notice of this state of things. The defendants in this case well knew, when they located their claims, that the unavoidable result of their work and of the work of others upon the stream would be to fill the bed and force plaintiff to raise its dam, or to utterly abandon its property.

By the Court: SAWYER, J.

This is an action to recover damages for the destruction of an addition to a dam, by means of which the waters of Shady Creek were turned into plaintiff's ditch, and to restrain defendants from tearing down any other addition that may be

made. The defense is, that said addition so torn down was a nuisance to defendants' mining claim.

The plaintiff's testimony tended to show the following state of facts, viz.: That plaintiff is the owner of a mining ditch cut for the purpose of conveying water from Shady Creek to French Corral for mining and other purposes; that the right to the use of said waters of Shady Creek was acquired, and said ditch located, as early as 1850; that the water of Shady Creek was turned into said ditch by means of a dam constructed across said creek; that the original height of said dam was six feet, but that, more than five years before the commencement of this suit, plaintiff had raised it from time to time, till it had attained the height of twenty-four feet; that in the month of August, 1863, plaintiff added from four to six feet more to the height of said dam; that said last addition was necessary in order to turn any portion of the waters of said creek into said ditch, and that this necessity was caused by the largely increased deposits of tailings in the bed of Shady Creek, which arose principally from mining operations conducted about two and a half miles above said dam, and partly from mining operations conducted upon the claim of defendants, by reason of which water and tailings were discharged into said creek, and flowed down to, and filled up said dam.

The defendants' testimony tended to prove that in 1853 defendants and their grantors were the owners and in possession of certain mining claims located in the bed and on the banks of Shady Creek, about three fourths of a mile above plaintiff's said dam; that said claims had been possessed and worked according to the mining customs, from the date of their location to the present time; that for the purpose of working said claims, defendants had a flume constructed above said claims, discharging at the lower end of their said ground; that, at the lower end of said flume, there was, up to 1863, a fall of from five to twenty feet; that in 1863 plaintiff raised said dam between five and six feet; that the bed of the creek was very flat, and in consequence of the raising of said dam the tailings were thrown back upon defendants' claims, and defendants were entirely prevented from working the same; that said claims were valuable and could be profitably worked before said dam was thus raised; that the raising of

the dam prevented their being worked, and that if the height of the dam should be reduced to the point from which it was raised in 1863, said claims could be again worked. Also, that, since the location of defendants' claims, a large supply of water had been brought from distant streams through other ditches and poured into Shady Creek, above said dam and claims of plaintiff's and defendants', and that by means of this additional supply of water the amount discharged into Shady Creek was greatly increased, and that the greater portion of the tailings thus run into Shady Creek came from mines and claims far above the claims of defendants.

There was some other testimony, but the foregoing is sufficient to show the real points in contest, and illustrate the theory upon which the case was submitted to the jury. The tendency of the testimony, then, is that the overflowing of the defendants' claims with water and tailings, upon which defendants rely to justify them in abating the last addition to plaintiff's dam as a nuisance, was occasioned by said addition of from four to six feet to the height of said dam, made in 1863; that it was necessary for plaintiff to make this addition in order to enable them to turn the waters of Shady Creek, to which they were entitled, into their ditch; and that this necessity was principally in consequence of mining done on the stream some two and a half or three miles above the dam, by reason of which a large quantity of tailings and *debris* was carried down and deposited in the bed of the stream above said dam, thereby filling it up.

Without particularizing the instructions given and refused, this case was distinctly submitted to the jury upon the theory, that if plaintiff acquired the prior right to divert any portion of the waters of Shady Creek by means of a dam and ditch, and the stream and dam should at any subsequent time, by reason of mining by strangers above, become filled up to such an extent as to make it necessary to raise the dam higher than it originally was, to enable the plaintiff to continue the diversion by means of its ditches, then the plaintiff is entitled to make additions to the height of the dam from time to time, as occasion requires, without limitation, and wholly irrespective of the effect of these additions upon the interests of other parties acquiring rights for min-

ing and other purposes on the stream above, subsequent to the original appropriation of the water of the stream. We think the principle thus broadly stated wholly inadmissible. The plaintiff is undoubtedly entitled to protection to the full extent of the right acquired by virtue of its prior appropriation of the waters of Shady Creek. The plaintiff appropriated a portion of the waters of Shady Creek, and diverted it by means of a dam and ditch sufficient for the purpose at the time, in the natural condition of the stream as it then existed. But it does not follow, as a legal proposition, that plaintiff thereby acquired the right to raise its dam higher and higher, as occasion might require, to obviate obstructions to its use in the manner originally appropriated, occasioned by physical changes in the condition of the stream not anticipated, whether arising from natural or artificial causes. The question, what is the extent of the right originally acquired by plaintiff to which all subsequently acquired rights must be subordinate, is one of fact for the jury. The dam, as originally constructed, was six feet high. Before any other rights had been acquired in the waters of the stream, or in the banks or the land adjacent, the plaintiff, undoubtedly, under the customs of the country and recognized law of the land, was authorized to appropriate the waters of Shady Creek for mining purposes, and to acquire a right to construct a dam and employ other means sufficient, in the condition of the stream as it then existed, to enable it to control the waters appropriated for the uses contemplated. How far great possible physical changes might then be anticipated and provided for by extending the claim, it is not now necessary to determine. But suppose the plaintiff appropriated the waters, and constructed its ditch and dam amply sufficient, under the condition of the stream and the country as it then existed, to make it available, and acquired a right to appropriate and use said water in the manner adopted and to the extent of the appropriation, this would not prevent other parties from acquiring rights in the surplus water, or in the bed and banks of the stream, or in the adjacent lands, to any extent which should not interfere with the rights before acquired. And when the rights of the subsequent appropriators once attach, the prior appro-

priator can not encroach upon them by extending his rights beyond the first appropriation. In this case the plaintiff appropriated the waters of Shady Creek, constructed its ditch and dam for the purpose of conveying it away for the uses contemplated, and the mode of use, so far as anything to the contrary appears by the testimony, was sufficient in the then condition of the stream, to enable the plaintiff to enjoy the waters in the most advantageous manner. It does not appear that plaintiff acquired any rights, or made any claim beyond this. If plaintiff's right was thus limited to the extent and mode of the actual appropriation—and from the mere fact of appropriation and enjoyment to a certain extent, and in a particular manner, no presumption of law arises that the right is more extensive than is indicated by the actual appropriation and mode of enjoyment—then the defendants had a right to take up the mining claims on the stream above, and work them in any manner which would not encroach upon the rights of the plaintiff, as they were actually vested and enjoyed at the time of locating such mining claims. To that extent they themselves would be the first appropriators, and being first in time, would be first in right. When the right has once vested in the defendants, the plaintiff is no more justified, by extending its own claim, or changing the means of appropriation, in interfering with the full enjoyment of the right vested in the defendants, than the defendants would be, in encroaching upon the prior rights of the plaintiff. The fact only appears in evidence that plaintiff first appropriated a portion of the waters of Shady Creek at a certain point, and diverted and enjoyed them all by means of a ditch and dam of a certain height. From these facts alone, as before intimated, no legal presumption arises, that a right had at that time vested to take the water out at a point higher up the stream where a dam would flood defendants' claims, or by means of a higher dam which would affect the water at said point higher up the stream in the same manner. The legal presumption from these facts alone would rather be, that the right was no more extensive than the present enjoyment. The limitation of plaintiff's right to its actual enjoyment at the time being assumed, the defendants were authorized to take up mining claims on the stream above, and hold and work them in the condition

in which they found them, so far as they could do so without injury to the plaintiff's prior rights, and after their rights became vested the plaintiff could not rightfully construct a dam at a point further up the stream and thereby flood the defendant's claims which were not affected by the full enjoyment of the water rights of the plaintiff, as they existed at the time of the location of said claims, nor could the same results be lawfully accomplished by erecting a dam of much greater height than the old one at the point where it was before located. The latter mode of encroachment is as clearly illegal and wrongful as the former. The defendants located their claims as early as 1853, and, so far as the testimony, or any legal inference arising from the facts which the testimony tends to prove, shows, without in any way encroaching upon the rights of plaintiff as they then existed. The claims were worked for ten years, during which time plaintiff's dam was raised from six feet—the height at which it was originally built—to the height of twenty-four feet, without in any way flooding or damaging defendants' claims. If the plaintiff did not, in fact, before the location of defendants' claims, acquire the right to erect its dam to the height to which it was finally carried in 1863, they could not afterward acquire the right as against defendants without their consent. The fact that subsequent changes occurring in the bed of the stream render it impossible to longer divert the water at the point chosen, without raising the dam, can make no difference. The question is, what was the extent of the plaintiff's right to affect the stream above by its dam at the time the defendants' claim was located. Whatever was left unappropriated at that time was open to be appropriated by defendants, and if they by first appropriation acquired the right to work their claims in their condition at that time, the plaintiff was not authorized, by erecting a higher dam, to interfere with that right. The plaintiff may have legal remedies against the parties who filled up their dam and destroyed the use of the water right acquired, but the remedy is not by building their dam higher, and thereby destroying the rights of other parties who had located on the stream above, subject only to the right of the plaintiff, whatever it was, as it existed at the time of such location. If the defendants had the right to work their claims in the con-

dition they were in when located in 1853, and in the manner in which they did work them, and in which they had enjoyed them for a period of ten years, then the raising of the plaintiff's dam to such a height as to throw the water and tailings back upon said claims in the manner indicated by the testimony is a violation of the maxim *sic utere tuo, ut alienum non lædas*, and defendants were injured as well as damaged. The right acquired by plaintiff to take the waters of Shady Creek at the point where it was diverted by its dam did not necessarily carry with it the legal right to elevate the dam from time to time, as great physical changes in the condition of the stream might afterward require, for all future time, without reference to other superior rights subsequently acquired. The exercise of such a right might lead to flooding a large part of the country above.

Undoubtedly, when plaintiff took up the water, and before other conflicting interests had vested, the right to the water carried with it the right to construct such works as were necessary to the full enjoyment of the water. But when it established its works, and fully appropriated the water by means sufficient for the purpose, and used it for a term of years in a particular mode, unless there was something manifesting a more extended right, other parties had a right to suppose that the plaintiff had itself defined the limits of its rights, and act accordingly.

The question to be determined is, to what extent did plaintiff acquire the right to affect the banks and bed of the stream at the point where defendants' claims are located, before the location of said claims? This point being ascertained, the plaintiff is not authorized to exceed that limit, to the damage and injury of the defendants.

The case was submitted to the jury upon an erroneous theory, and for this reason the judgment must be reversed and a new trial had.

We have said nothing as to the effect upon the rights of the parties of the working of defendants in contributing to the filling up of the plaintiff's dam and rendering its elevation necessary, for the reason that the court in its charge did not take this element into account, and no question of the kind is presented by the record. We only refer to it, because

respondent's counsel have discussed that portion of the testimony in their brief; but it was not in the case upon the theory adopted by the court in stating the law to the jury. In the second instruction the court speaks generally of "obstructions caused by tailings coming down the stream from mining claims above"; and in the third, of "tailings coming down said stream from mining claims of other parties above said dam."

Judgment and order denying a new trial reversed and new trial granted.

Mr. Justice SANDERSON expressed no opinion.

PROCTOR V. JENNINGS.

(6 Nevada, 83. Supreme Court, 1870.)

Upper and lower dams—Effect of booming—Damnum absque injuria. In 1865, A built a dam and mill upon a certain stream; afterward B built another dam about 155 feet below the mill-wheel of A, which lower dam of B, however, at the time when constructed and for a long time afterward, in no wise interfered with the mill or dam of A; but in 1869, parties owning mining claims above both dams began to work their claims by a system entirely unknown at the time the dams in question were built, which system (booming) consisted in alternately checking the flow of water and then letting it out suddenly at a full head, whereby great quantities of tailings were carried down stream, which, settling between the two dams in question, caused an obstruction to the mill-wheel belonging to A, the plaintiff. *Held*, that B, the defendant, was not responsible; that it was a damage resulting only as a remote result of his building the lower dam, and that it was a clear instance of *damnum absque injuria*.

¹ **Rights of subsequent appropriators of water.** Priority of appropriation where no other title exists, undoubtedly gives the better right. All the rights of all subsequent appropriators are subject to his who is first in time. The subsequent appropriator only acquires what has not been secured by those prior to him. But what he does thus secure is absolute and perfect, and his right is to be determined by the condition of things at the time he makes his appropriation.

Appeal from the District Court of Storey County, First Judicial District.

¹ Compare *Nevada Co. v. Powell*, 4 M. R. 253.

The opinion fully states the facts.

HILLYER, WOOD & DEAL, for appellant, who was defendant below.

HENRY K. MITCHELL, for respondent.

By the Court: LEWIS, C. J.

1. "In the year 1865, the plaintiff constructed a water mill upon Six-mile cañon, the motive power of the same being the water of the stream of said cañon, conducted therefrom by a ditch leading from a point above the mill to the said water-wheel. After passing over said wheel, the water fell into the channel of said stream and passed on down the same, there being sufficient fall from the bottom of the wheel to the channel, and from there down sufficient grade to the channel to enable the water leaving the wheel to pass off freely and without obstructing the working of the same. As to the defendant, the plaintiff was the prior appropriator of the water privilege to the extent above mentioned, and he has since done nothing by which he has lost any of the rights so acquired, or diminished their extent.

2. "Subsequently to the acquisition of plaintiff's rights, and in October, 1867, the defendant constructed a dam across the channel of said stream, at a point about one hundred and fifty-five feet below the wheel of plaintiff, and below and east of the east line of plaintiff's land, together with a waste-way, flume and ditch, for the purpose of furnishing water power for certain works of defendant below. At the time of constructing said dam, the defendant was fully apprised of the prior rights of plaintiff, and was expressly notified by him not to obstruct the same in any manner to interfere with those rights.

3. "The effect of the construction of defendant's dam was to cause the sediment coming down said stream to gather above the dam to the level of the bottom of the ditch leading from the same, and to cause the water of the stream to set back toward plaintiff's wheel, upon the same level, and thus diminish very materially the grade of the channel below said wheel. But at the time of its construction it did not so back the water or sediment, or diminish the grade as to prevent

the free flow of the water from plaintiff's wheel, and did not at all interfere with the working of the same.

4. "The dam so constructed by defendant has not since been altered in height, and there has been no alteration of the level or altitude of the flume and ditch leading from the same. During the latter part of the year 1867, the whole of the year 1868, and up to the — day of June, 1869, the works of defendant below did not in any manner obstruct or interfere with the free flow of the water from plaintiff's wheel, which was in use during all said period, or in any manner obstruct or interfere with the working of said wheel; and had the waters of said stream continued to flow down to the said works of plaintiff and defendant in their natural state and condition in which they did run and flow down to the same at the time of defendant's appropriation, and during the period aforesaid, up to the — day of June, 1869, the said works of defendant would not materially have interfered with the workings of plaintiff's wheel, or the free flow of the water therefrom.

5. "About the — day of June, 1869, certain parties, who were in the possession of mining claims along the channel of said stream above the works of both plaintiff and defendant, adopted a new mode of working their claims and of using the waters of the stream in the working thereof. They had therefore so used the waters as to permit the same to flow down naturally and regularly, and the change consisted in penning the water up for longer or shorter periods in reservoirs constructed for that purpose, and then permitting the same to escape suddenly and in large quantities, and pass down the stream with a flood. The effect of this was to carry down by the power of the floods of water so discharged, large amounts of tailings and sediment collected in said reservoirs and lying in the channel of said stream to the works of defendant, and thereby fill up his dam above the ordinary level of discharge, and to cause the same to accumulate in masses above said works as far back as the wheel of plaintiff, and to cause the back-water and sediment to obstruct the free flow of water from the wheel of plaintiff, and prevent the regular and efficient working thereof.

6. "Had it not been for the acts above mentioned, the

works of defendant would not have materially interfered with the working of plaintiff's wheel; and on the other hand, had it not been for the works of the defendant, the acts of said miners would have done no injury to the plaintiff; and the grade of the channel below said wheel, if left in the condition in which it was prior to the construction of defendant's dam and ditch, would have been sufficient to discharge freely all the water and sediment coming down said stream, notwithstanding the irregular flow thereof."

Upon these facts, found by the court below, a decree was rendered enjoining the defendant from continuing his dam at such a height as in any manner to interfere with or retard the revolutions or workings of the plaintiff's water-wheel attached to the mill and buildings mentioned in the complaint. The defendant appeals.

But one question is presented by the record, or need be considered by the court, namely: Can a dam erected on a stream in a manner in no wise injurious or prejudicial at the time of its erection to a mill-owner above, but which, by reason of circumstances happening subsequently, and which could not have been anticipated at the time, operating in connection with it, and so causing the water to flow back upon the mill above, be held such obstruction as to authorize its abatement, or justify a recovery of damages against the person so building the dam, for injury thus occasioned? We think not. Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum—so the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried, that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his. Nor has any one the right to do anything which will, in the natural or probable course of things, curtail or interfere with the prior acquired rights of those either above or below him on the same stream.

The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any right of others to interfere with it, as the rights of those before him are secure from interference by him. Upon what principle, then, can it be held that he is responsible for injuries resulting to the prior appropriators, occasioned not immediately by his acts of appropriation, but by unforeseen and fortuitous circumstances happening after his appropriation, and acting in connection with the means employed by him to appropriate the surplus water?

Here the defendant had the undoubted right to make use of all the water flowing from the plaintiff's mill, and to build a dam or employ any other means of appropriation not prejudicial to the rights of the plaintiff. But at the time Jennings built his dam, it did not in any way interfere with the right of Proctor, nor is it claimed that in the ordinary course of things it would have done so, or that it could have been anticipated that the immediate cause of the injury would have occurred. Under such circumstances, the law, we think, does not hold the defendant liable, nor adjudge his dam such an obstruction or nuisance as may be abated.

The Inhabitants of China v. Southwick, 3 Fairf. 238, was an action on the case brought to recover damages for an injury done to the plaintiff's bridge at the head of Twelve-mile pond, raised as it was alleged by the defendants at the outlet of the pond.

It appeared that the defendant built the dam at the point designated, and thereby raised a head of water, but not so high as to flow or injure the bridge of plaintiffs. Afterward, however, by heavy rains and a violent storm of wind the waters were thrown upon the bridge, and it was destroyed. The court held the defendant not liable, saying: "The jury found that the head of water raised by the defendant's dam was not, at the period complained of, high enough to flow the plaintiff's bridge or do damage thereto. Its erection, then, was a lawful act, not in itself calculated to do any injury to the plaintiffs. Their loss was occasioned, as the jury have found, by great rains, or by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind superadded might not have done the

damage. It may have been one, then, of a series of causes to which the injury may be indirectly ascribed. Their connection, however, was fortuitous, and resulted from an extraordinary and unusual state of things. Neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years, while the dam was higher than it was when the bridge was carried away. Such an event could not, therefore, have been reasonably calculated upon or foreseen. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which is attempted to be charged was in itself innocent. The law gives no encouragement to speculations of this sort. It rejects them at once. Hence the legal maxim: *Causa propinqua non remota spectatur*. *

* If there had been no dam, the injury might not have happened; but the defendant had the right to erect it, and that without being held answerable for remote and unforeseen causes."

Again, the same rule is thus laid down in *Bell v. McClintock*, 9 Watts, 119: "When the plaintiff erected his dam he was bound to notice, not only its effects at the time, but its effects at all seasons as well. In this stream as well as all other large streams which fall into the Allegheny river, there are regular freshets or floods which swell the volume of water, and thereby enable the inhabitants to raft down the river the various products of the country. They are expected with considerable certainty at fixed times and seasons. It was the duty of the plaintiff with reference to this, which is at least of yearly occurrence, to calculate the immediate probable effects the dam would have at all seasons of the year on the property of his neighbors above as well as below his erection. A neglect to use the necessary precaution, or a miscalculation of its effects, where it works an injury to another, may be compensated in damages. But where the injury arises from some cause out of the ordinary course, from some unusual cause, as for instance, from a flood or freshet such as has been described by the witnesses, the owner of the dam is not liable to damages. It is *damnum absque injuria*. They are

not such accidents as ordinary foresight or prudence can guard against, and for this reason a distinction has been taken as to the liability of the party": See, also, Ang. on Wat., Sec. 347 *et seq.*

By the rule adopted in these cases, which seems not only a correct, but just one, it was incumbent on the defendant to so erect his dam that it would do no injury to the plaintiff, either under the then existing circumstances, or such as might be anticipated to happen in the future; but he was not required to go further, nor where he has used such precaution, is he liable for injuries resulting from causes which could not be foreseen in conjunction with his dam. Such is the result of the rule when applied to this case.

That he could not have foreseen or anticipated the new mode of working the mines above himself and plaintiff is a self-evident proposition, if, as found by the court below, it were in fact a new process.

The decree must be vacated. It is so ordered.

Reversed.

STONE ET AL. V. BUMPUS ET AL.

(40 California, 428. Supreme Court, 1870.)

Action to abate nuisance—Damages—Proof necessary to warrant recovery. In an action to recover damages for the erection of a dam, and to abate the same as a nuisance it appeared that the defendants had erected a dam across a cañon at a point below a mining claim worked by plaintiffs, which dam obstructed the flow of water and tailings so as to interfere with plaintiffs' workings. *Held*, that to enable plaintiffs to recover it should have appeared at the trial: 1st, That the plaintiffs owned the ground claimed by them. 2d, That the dam prevented their working to advantage. 3d, Alternatively that the defendants had no title to the bed of the cañon, or if they had, that their right was acquired subsequent to that of the plaintiffs, or if prior, that the dam was not needed to enable the defendants to work to advantage.

² **No estoppel by silence, to affect title.** An instruction, that if defendants owned the ground in dispute, but stood by and permitted plaintiffs

¹ S. C. on second appeal, 4 M. R. 278.

² See *Patterson v. Hitchcock*, 3 Colo. 533; *Post ESTOPPEL*; *St. Louis Co. v. Green*, 13 Federal R. 208; 2 Colo. L. R. 554.

to expend money and labor in developing it, and by their silence induced plaintiffs to believe their title good, then such matters should be taken into consideration in determining the conflicting claims, is erroneous, for such matters could have no possible effect upon the question of title.

Pleading—Proof of title. A defendant who denies that the plaintiff is the owner of a mining claim may overcome the plaintiff's evidence of title by proving title in himself whether he has or has not alleged title in himself.

Defective complaint. A complaint in which damages are claimed for the obstruction of the flow of water and tailings in a cañon is radically defective if it fails to allege that plaintiffs are entitled to the use of the cañon to convey away such water and tailings.

Appeal by the defendants, Peleg and E. D. Bumpus, from the District Court, County of Placer, Fourteenth Judicial District.

This is an action to recover damages for the erection of a dam, and to abate the same as a nuisance, and to enjoin the continuance thereof.

Defendants admit the erection of the dam, and claim the right to continue the same; and allege that the ground claimed by plaintiffs belonged to and is a part of the mining claim of defendant, P. Bumpus.

On the trial, the plaintiff asked the court for the following instruction to the jury: "If defendants or either of their grantors ever owned the ground called the Stone Boys' Claim, at the time plaintiffs took up and worked the same, then if they stood by and permitted plaintiffs to expend money and labor in working and developing the same, and kept silent about their claim, and thereby misled plaintiffs and induced them to take the ground, believing their title good, then defendants are precluded from setting up their title to the ground against that of plaintiffs; and this is equally the case whether this was done by defendants themselves or by their grantors before they parted with title to defendants." Which the court refused, and then instructed the jury, that the matters recited in the instruction, if true, should be taken into consideration in determining the conflicting claims of the parties to the premises in dispute.

The remainder of the case is stated in the opinion.

CHAS. A. TUTTLE and W. D. LAWRENCE, for appellants.

JO. HAMILTON, for respondents.

SANDERSON, J., delivered the opinion of the Court, RHODES, J., SAWYER, C. J., and CROCKETT, J., concurring:

This is an action founded upon the 249th Section of the Practice Act, which defines a nuisance, and provides remedies therefor. The plaintiffs allege that they are the owners of a certain mining claim, situated on the north side of Indian Cañon in Placer county, which mining claim can not be worked without the use of the cañon as an outlet for water and tailings.

That the grade of the cañon is light, and that the defendants have erected and are maintaining a dam across the cañon, at a point below their claim, which dam obstructs the flow of water and tailings down the cañon to such an extent as to render the working of the plaintiffs' claim impracticable.

The defendants, in effect, admit the erection of the dam, and its effects upon the work of the plaintiffs, to be as alleged; but deny that the plaintiffs own, or are entitled to work the ground in question, and to the contrary allege that the ground is in fact a part of their claim, which is older than the pretended claim of the plaintiffs is alleged to be, and is what is called a cañon claim, which according to mining custom embraces all the ground lying in the bed and banks of the cañon, extending to the bed rock on either side as high as the water-line; and that the dam was erected for the purpose of enabling them to work their claim, which as they alleged can not be worked without it.

In view of these issues to enable the plaintiffs to recover, it should have appeared at the trial: 1st. That the plaintiffs owned the ground claimed by them. 2d. That the dam prevented their working it to advantage. 3d. Alternatively that the defendants had no title to the bed of the cañon; or if they had, that their right was acquired subsequent to that of the plaintiffs, or if prior, that the dam was not needed to enable the defendants to work to advantage.

As to the first proposition, the testimony preponderates in favor of the defendants, but still it is conflicting, and so far as the action of this court is concerned, the plaintiffs' title must be considered as made out. But the first proposition was the only one which was established by the testimony.

That the defendants had the prior right to mine, and that they could not mine without the dam, can not be questioned upon the testimony. There was no testimony to the contrary. The verdict is therefore not sustained by the evidence.

Order and judgment reversed and a new trial granted.

On rehearing:

RHODES, C. J., delivered the opinion of the Court, TEMPLE, J., and CROCKETT, J., concurring:

We are satisfied that the judgment rendered on the former hearing was correct. On a review of the evidence we are of the opinion that on the question whether the title to the mining ground claimed by the plaintiffs is in them or in the defendant (Peleg Bumpus), the preponderance is in favor of the defendant, and the conflict in the evidence is very slight. It was proven beyond controversy, that the owners of the Brush Dam claims acquired by purchase the banks of the cañon, and thereafter they and their vendees claimed and held the bed and banks of the cañon; that they claimed the ground in controversy, and worked along its front as long as it would pay; that the defendant and Wilson, while they were joint owners of those claims, and the defendant, after he became their owner in severalty, claimed the ground in controversy as a part of the Brush Dam claims. The principal evidence which conflicts with this proof of title in the defendant, is the statement of the plaintiffs that when they located their claims—which was while the defendant and Wilson were the joint owners of the Brush Dam claims—the ground in controversy was vacant. This presents so slight a conflict that it is difficult to conceive how the jury could have found for the plaintiffs on this issue, except they were misled by the plaintiff's third instruction, respecting the estoppel of the defendants by matters *in pais*. The instruction was properly refused, for the matters therein recited would not estop the defendant from claiming title to the ground claimed by the plaintiffs; but the court directed the jury that "the matters recited in the instruction, if true, should be taken into consideration in determining the conflicting claims of the parties to the premises in dispute." The direction was clearly erro-

neous, for those matters could have no possible effect upon the question of title.

We do not agree with the plaintiffs in their position in respect to the effect of the answer, in limiting the extent of the title or claim of the defendant, even conceding—which we do not admit—that his claims, which, he alleges, “include all the earth and gravel in the bed and upon both banks of said cañon to the bed rock, as high as the water line thereof,” excludes the plaintiffs’ claims. The defendant expressly alleges that he owns the mining ground described in the complaint; and, besides this, he denies that the plaintiffs are the owners; and without an allegation of title in himself, it was competent to him to overcome the plaintiffs’ evidence of title by proving title in himself.

It is proper to remark, for the purposes of a new trial, that the complaint is radically defective, because it fails to allege that the plaintiffs possessed the right to use the cañon to convey the water and tailings from their claims. The allegation that it is the natural and proper channel and outlet for the water and tailings from those claims, is not even an argumentative averment that they have the *right* to its use.

Judgment reversed and cause remanded for new trial.

SPRAGUE, J. I dissent.

NELSON V. O'NEAL ET AL.

(1 Montana, 284. Supreme Court, 1871.)

Injunction—Dam to stop tailings. A court does not abuse its discretion by refusing an injunction to restrain parties from building a dam on their own mining ground, to prevent injury to it by the flow of tailings from other ground.

¹**Tailings—Use of channel.** A miner is entitled to the free use of a channel of a creek, to allow the water which comes down from above to flow away from his mining ground, but he has no right to fill the channel of the creek with tailings and debris, and let it flow down upon another’s ground.

Appeal from the Third District, Lewis and Clarke County.

¹*Lincoln v. Rogers*, 1 Mont. 217, and other cases under TAILINGS.

The facts are stated in the opinion of the court.

The judgment appealed from was rendered in the District Court in August, 1870, by SYMES, J.

SHOBER & LOWRY, E. W. TOOLE and G. MAY, for appellant.

It is admitted by the pleadings that respondents were insolvent. The jury found that the erection of the dam higher, as complained of by appellant and threatened by respondents, would interfere with the profitable use and enjoyment of appellant's mining ground. Appellant was entitled to an injunction to restrain respondents from erecting said dam: *Ramsay v. Chandler*, 3 Cal. 90.

An injunction is a preventive remedy, and it comports more with justice to both parties to restrain the threatened trespass, than to leave the appellant to his remedy at law, particularly when the respondents admit their insolvency and have no remedy at law: *Slade v. Sullivan*, 17 Cal. 102; Hill on Inj., Ch. 1, §§ 1, 5, 7, 14, 31.

Appellant's mining operations will be interfered with, if respondents are not enjoined. Respondents have shown no right to trespass on appellant's ground.

W. F. SANDERS, for respondents.

Respondents own the ground on which the dam was erected and debris arrested. Respondents threatened to raise their dam higher to stop a trespass of appellant. They could compel appellant to stop this trespass on his own ground. The pleadings and findings do not show who has priority of right in mining. Appellant can not have judgment until the questions relating to the right of respondents to flow back on appellant's ground, debris, tailings, etc., which appellant is wrongfully attempting to flow on respondents, are settled in favor of appellant: *Logan v. Driscoll*, 19 Cal. 623; Am. Law Reg. 1867, 1868, p. 698.

Parties must care for their own tailings on their own ground. Respondents could crib those of appellant on his own ground, but the jury find that respondents cribbed them

on their own. A mere threat to commit a trespass, without an overt act, does not justify an injunction.

KNOWLES, J.

This is an action of trespass, brought by appellant for damages for an alleged entry upon his mining ground, and erecting a dam thereon, which stopped tailings upon the said mining ground, and alleging that the respondents threatened to continue the injury, and to erect the said dam higher, and asking for an injunction to restrain them from the commission of these wrongs. Respondents deny that appellant owns the mining ground described; admit erecting the dam and the intention to erect it higher, and aver that the dam is on their own ground, and that the same was erected to prevent appellant from running his tailings down upon their ground.

The jury, in their special findings, determine that appellant does not own the mining ground upon which the dam was erected; that respondents had not interfered with the mining rights of appellant by the erection of the dam in question. They also find that the erection of the dam higher will interfere with the profitable mining operations of appellant. Upon this last finding, appellant asked an injunction of the court below, which was refused. This is assigned as error.

It appears, from the complaint of appellant, that the tailings which the dam of respondents prevented from flowing down, were tailings from appellant's mining ground. The granting or refusing an injunction was discretionary with the court below. We do not think it was an abuse of discretion in refusing an injunction to restrain the respondents from building a dam on their own ground, so as to prevent appellant from committing an injury upon the same. Appellant would be entitled to the free use of the channel of the creek, to allow the water which came down from above to flow away from his mining ground, but he had no right to fill the channel of the creek with tailings and debris, and let it flow down upon respondents' ground.

Order of the court below affirmed, with costs.

Judgment affirmed.

STONE ET AL. V. BUMPUS ET AL.

(46 California, 218. Supreme Court, 1873.)

Workings—Judgment of mine owner not to be questioned—Custom.

It is not within the province of a court to question the judgment of the owner of a mining claim, or to determine whether one mode of use would be more beneficial than another; such ruling applied to the case of working a claim by a dam and flooding claims above, a local custom so to work having been established.

Evidence—Assertion of right no threat. The declaration of the owner of a cañon claim before building a dam, that he would put in a dam that would flood plaintiff's claim (a junior claim lying above), is entirely consistent with the necessity or utility of the structure in the working of the cañon.

² **Damnum absque injuria.** The erection of a dam so as to flood junior claims above, held to be *damnum absque injuria*.

Appeal from the District Court, Fourteenth Judicial District, County of Placer.

Indian Cañon is in the gold-bearing region of the Sierra Nevada mountains, in Placer county, having its source at an altitude of about forty-five hundred feet above the level of the sea. It is several miles in length, and at the place where the claims in dispute are located is about one thousand feet in depth. The bed of the cañon contains gold-bearing earth; and on the summit of the mountains, on either side of the cañon, are gold placer claims, which are worked by washing the earth through flumes, in which the gold is collected into the bed of the cañon. This earth, when it reaches the bed of the cañon, still contains gold, but ceases to be the property of the owner of the claim above. Several parties had, prior to 1850, located the bed of the cañon for a distance of more than three thousand feet for the purpose of laying a flume in its bed, in which to work the gold-bearing earth which was washed from the mountains above. Defendant Bumpus had acquired by purchase the rights of these parties. On the banks of the cañon were bars, which also contained gold; and on the 10th day of September, 1866, the plaintiffs located one of these bars, on the side of Bumpus' claims for the purpose of working it

¹ S. C. on former appeal, 4 M. R. 271.

² *Contra*, as to senior claims, *Nevada Co. v. Powell*, 4 M. R. 253.

as a mining claim. They immediately excavated a ditch, about three fourths of a mile in length, from their claim up the side of the mountain to a ravine, for the purpose of obtaining water to work the same. The plaintiffs' claim could be worked in no other way than by washing the earth down the bed of the cañon. The plaintiffs had done considerable work on their claim when, in February, 1867, the defendant Bumpus constructed a dam on his cañon-claim across the bed of the cañon, at a place about seven hundred feet below the plaintiffs' claim, and thereby caused the water to flood the plaintiffs' claim, so that it could not be worked. The cañon contained a large amount of tailings which had covered up one flume, and Bumpus claimed that he could not work the same without constructing a dam which would stop the flow of the tailings until he could wash away the tailings below the dam, and lay a flume on the bed rock, and then construct another dam higher up, and go through with the same process. This action was brought to abate the dam as a nuisance. On the trial, the plaintiff, A. J. Stone, testified as follows:

"December 10, 1866, first saw Bumpus. He came to our cabin and asked us, who is working on that bar? We said, we were. He said, did you not know that cañon has been bought and sold a dozen times, and that I own it? He said he should sue us. He then said he would not sue, but would put in a dam and make us sue. Shortly after he came down again and said, what are you going to do about that claim down there? I said, going to work it. He said he would drive us off, and we should never work it. He said you shall never make a dollar out of it. We said, will you pay us for the work we have done? He said no; I did not hire you, and will not pay you. He said he would put in a dam that would flood us six feet deep with tailings. He said he thought Wilson had forbid us before. Wilson owned with Bumpus in the cañon. About the 10th of March he commenced putting in a dam across the cañon seven hundred and fifty feet below our claim. He felled trees across and made a dam seven feet high. It flooded the tailings back three feet deep on our claim. Could have worked our claim but for the dam. There was no natural outlet for our claim but the bed of the cañon. We could do no more work, and had to leave. There

was an old flume below the dam in the cañon, but none opposite our claim."

On cross-examination, Stone said: "Knew when we located our claims that Bumpus owned the bed of the cañon. Had known it for several years. His cañon-claim extended from above our claims, down the bed of the cañon below where he built the dam. We never owned or claimed to own any of the bed of the cañon."

The defendants moved for a nonsuit, because "the evidence showed that when plaintiffs' claims were located the defendants owned, and had owned and possessed Indian Cañon, and that plaintiffs had never acquired the right to use the bed of the cañon to work their claims."

The other facts are stated in the opinion.

JO. HAMILTON, for appellants.

C. A. TUTTLE, for respondents.

By the Court: NILES J.

This case was once before this court upon appeal, and is reported in 40 Cal. 428,¹ and the judgment in favor of the plaintiff was then reversed and a new trial granted. Upon the second trial a judgment of nonsuit was rendered against the plaintiff, and from this judgment and the order overruling plaintiffs' motion for a new trial this appeal is taken.

In the former opinion (which is now the law of this case) it was said, that "to enable the plaintiffs to recover, it should have appeared at the trial: First, that the plaintiffs owned the ground claimed by them; second, that the dam prevented them from working it to advantage; third, alternatively, that the defendants had no title to the bed of the cañon, or if they had, that their right was acquired subsequent to that of the plaintiffs, or if prior, that the dam was not needed to enable the defendants to work to advantage."

There is no variance between the facts presented upon the former and the present appeal material to the decision of the case. As then, the plaintiffs' ownership of the mining ground claimed by them, and that the dam erected by the defendants prevented the advantageous working of plaintiffs' ground,

¹ 4 M. R. 271.

must be conceded. The title of the defendants to the bed of the cañon, and that the right of the defendants was prior to that of the plaintiffs, was admitted by the testimony of the plaintiff Stone, and was not contradicted by any other testimony. There was no testimony tending to show that the dam was not beneficial to defendant, or requisite to the advantageous workings of his claims. The declaration of the defendant prior to the construction of the dam, that he would put in a dam that would flood the plaintiffs' claims, is entirely consistent with the necessity or utility of the structure in the working of the cañon. His subsequent testimony before the justice of the peace, that he had put in the dam to flood out the plaintiffs, was qualified by the additional declaration that it was constructed for the further purpose of working the cañon. It is not within the province of a court to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another.

It was clearly shown that the construction of dams by the owners of cañon-claims for the purpose of working them, was authorized by local customs. This right being conceded, the damage that might be occasioned by such structure to a subsequent locator would be *damnum absque injuria*.

Judgment and order affirmed.

Mr. Chief Justice WALLACE did not express an opinion.

1. Abatement of dam by gulch miners below, upheld as the exercise of a common law right: *Stiles v. Laird*, 5 Cal., 120; *Post* NUISANCE.

2. Action for injury from breaking of dam: *Boswell v. Laird*, 8 Cal., 469; *Post* NEGLIGENCE.

3. Mining ditch, against dam built above and later: *Natoma Co. v. McCoy*, 23 Cal., 491; *Post* DITCH.

4. Mandatory writ to compel repair of dam. *Falmouth v. Innys*, Mosely, 87.

¹THE ROCHESTER AND OLEOPOLIS OIL CO. V. HUGHEY.

(56 Pennsylvania State, 322. Supreme Court, 1867.)

Oil burning during delivery—Loss on vendor. Defendants purchased of the company, plaintiff, four barges of oil at a certain price per barrel. The barges were furnished by the defendant, and were partially filled when the oil caught fire, and barges and oil were burned: *Held*, that the property did not pass as fast as the oil entered the barges; that the defendant could not have been compelled to accept partially filled barges; that the delivery was not complete, and defendant not therefore liable for the value of the oil.

Idem—Control of barges during delivery. Evidence that by the custom of the trade at the place of delivery the barges to receive the oil were, during the delivery, in the custody and control of the purchaser, was properly rejected as not aiding the fact of delivery.

Error to the Court of Common Pleas of Allegheny County.

In the court below, the Rochester and Oleopolis Oil Company brought an action of assumpsit to September, 1866, against J. M. Hughey, to recover the price of a quantity of oil, alleged to have been sold and delivered by the plaintiffs to the defendant.

The oil having been burned, the question was whether the delivery was complete before the burning.

The plaintiffs gave evidence, by the deposition of A. L. Burnett, their agent, that he sold to Owsten, the agent of the defendant, four barge loads of oil, about 2,200 barrels, at \$4.50 per barrel, deliverable at Oleopolis, to be measured in the iron tanks of the Pennsylvania Tube Company.

The tube company receives the oil at the oil regions in their tubes; it is transported through the tubes and received into the tanks of the company at the several shipping points on the Allegheny river. The oil of the respective owners is not kept separate, but is measured when received by the tube company, and is delivered to the order of the owner by measurement at the tanks.

The evidence of plaintiffs further was, that 495 gallons had been run, on the afternoon of June 19, 1866, into a barge

¹ Cited *Sneathen v. Grubbs*, 4 M. R. 289.

furnished by Owsten; another barge was placed under the tanks, and about 450 barrels had passed into it, when the oil took fire, and both barges and the oil were burned.

The plaintiffs then offered to prove that by the custom of the trade at Oleopolis, the barges to receive the oil were, during the delivery, in the custody and control of the purchaser. This was objected to by the defendant, rejected by the court, and a bill of exceptions sealed.

Owsten, the defendant's agent, testified for him, that he made the contract for four boat loads of oil, about 2,000 barrels; he sent two boats to receive it; he received word that his boat was drawing 25 inches of water, and the river was falling; he went to Oleopolis, and found the river rising, and that another boat was loading outside of his; he told the agent of the company that he would load his boat five inches more, and therefore did not move her from the wharf. After the boat that had been loading near his was filled and moved away, he placed an empty boat by his first boat, and the tube company's hands let the oil into the second boat; before this boat was full, drawing but about 17 inches, it took fire, and both boats with oil were burned. He testified also, "the boats were not in a condition to run to Pittsburgh; he intended to put more in them, to fill them to 30 inches of water."

In rebuttal, the plaintiff proposed to ask the superintendent of the tube company "whether, at any time whilst you were superintending, or since, within your knowledge, the tubing company, or the owners of oil in the tanks, kept persons at the works for the purpose of taking charge of the boats whilst the oil was being delivered."

The offer was rejected by the court, and a bill of exceptions sealed for the plaintiff.

The plaintiff requested the court to charge the jury:

1. That if the oil sold by plaintiff to Hughey was to be measured in the tanks of the Pennsylvania Tubing Transportation Company, and delivered in barges furnished by Hughey, and the barges were, during the course of delivery, in possession and control of Hughey, or his agents, the oil was delivered as soon as it entered the barges, so far as to change the property as between seller and buyer, and the plaintiff would be entitled to recover the value of the oil so delivered in the barges.

2. That if the jury find that the barges were, during the time of delivery of the oil, in the custody of the plaintiff, nevertheless, as soon as any portion of the oil was separated from the common bulk, by measurement from the tanks, it became the property of the defendant, and was at his risk, and the plaintiffs would be responsible only for loss occasioned by their negligence.

3. If the jury find that it was the duty of the Pennsylvania Tubing Transportation Company to take charge of and control the barges while the oil was in course of delivery, that the company would be the common agent of plaintiff and defendant, and any portion of the oil, as soon as separated from the common bulk, would be the property of the defendant, and at his risk, and the plaintiff would be entitled to recover for the value of the oil so delivered.

The points were all refused.

The defendant, in his 2d point, requested the court to charge that under the contract the defendant was not bound to accept a delivery of oil from the plaintiff in any less quantity than that of *one full boat*; the question whether the boat was full or not to be decided by the defendant or his agent, Mr. Owsen, only.

To which the court answered: "Affirmed if you believe the contract to be for the sale of oil by the boat-loads."

The court (Stowe, A. J.) charged:

"The first point is as to what the contract was.

"If it was to be delivered in boat-loads, and the purchaser had the right to say when the boat was loaded, and you should find that this boat was not accepted by defendant's agent, and that he was not bound to accept it because it was not a boat-load, that is, not filled so that he was bound to take it from the vendor, then there was no delivery in law, and plaintiff can not recover.

"If you should find, however, that the first boat was reasonably loaded, so that purchaser was bound to accept, or that the boat was actually taken into his charge so as to waive the right to have more oil put into it, then plaintiff can recover for that.

"As to the oil running into the boats at the time, there was no delivery of that in law, because if the contract was for delivery in boat-loads, about 2,000 gallons, as stated by the witnesses on both sides, the boat was not filled so that plaintiff was bound to take it from the vendor.

"As to this latter it is clear under all the evidence that if the plaintiff had shut off the oil and requested defendant to pay for what was in the boat, he could not have compelled defendant to receive it, nor to pay for it.

"In reference to the first boat, was there anything further to be done before the plaintiff had a right to require the defendant to take and pay for it?

"That depends upon whether the barge was sufficiently full, or not being full, whether Owsten, defendant's agent, had already taken possession of it, under such circumstances as to indicate he was satisfied to take it as it was.

"As to the latter the plaintiff can not recover in this action, because it is not pretended that the boat was in a condition to deliver."

The verdict was for the defendant.

The plaintiff took a writ of error, and assigned for error the rejection of their offers of evidence, the answers of the court to their points, and to the defendant's 2d point, and that "the court erred in the whole charge and in each part thereof, and especially in the assumption that the plaintiff was not entitled to recover unless the boats were so loaded that the defendants were bound to accept them."

J. F. SLAGLE, for plaintiffs in error, cited *Snyder v. Wertz*, 5 Wh. 163; *Gilpin v. Howell*, 5 Barr, 41; *Penna. Railroad v. Zebe*, 9 Casey, 318; *Shaw v. Levy*, 17 S. & R. 101; *Hilliard on Sales*, 86; *Story on Sales*, § 299, note 3; 300, 389; *Winslow v. Leonard*, 12 Harris, 17.

S. A. PURVIANCE and T. M. MARSHALL, for defendant in error, cited *Rugg v. Minett*, 11 East, 210; *Story on Sales*, § 299; *Penna. Railroad v. Zebe*, 9 Casey, 318.

The opinion of the court was delivered by THOMPSON, C. J.

The question was submitted to the jury on the trial below,

and they found that the contract between the plaintiff and defendant was for the sale and delivery of four barge-loads of oil, and not a sale of oil by the barrel. Of course, until delivery, no specific oil passed to the defendant. Until this took place, he had only a right of action to recover for a breach of contract.

It is unnecessary to say whether the defendant was bound to take and pay for the number of barrels in each completely laden barge; if there be a question about that it is not here,—but whether the contents of partially laden barges in progress of being filled, passed as fast as it entered the barge. The court thought not, and so decidedly think we. The defendant could not be compelled to take a partly filled barge when he had contracted for full ones, any more than if he had contracted for a barrel of oil, could he have been compelled to accept one, half or quarter full; this would hardly be contended for, yet the principle is the same: *Winslow, Lanier & Co. v. Leonard*, 12 Harris, 14; Story on Sales, §§ 296, 299. Under the finding of the jury there is little room for argument against the ruling complained of. Nor do we see any error in rejecting the offers of testimony. Not one of the assignments of error was according to rule and we might have dismissed them all without notice, but did not, hoping for more accuracy in the future.

Judgment affirmed.

SNEATHEN ET AL. V. GRUBBS ET AL.

(88 Pennsylvania State, 147. Supreme Court, 1878.)

Incomplete sale of coal. G. & Co. agreed in writing that they would deliver to S. & W. at their landing in Pittsburgh, two barges of coal, "price to be 4¼ cents per bushel, Cincinnati or Louisville gauge. Terms cash, when delivered in Pittsburgh, free of all charges." S. & W. furnished the barges, and the coal was placed therein by G. & Co., but owing to the low water in the river they could not be taken to Pittsburgh. While thus lying at the works the coal was levied upon by creditors of G. & Co. S. & W. brought an action of replevin. *Held*, that as the delivery of the coal had not taken place and the terms of the contract of sale had not been performed, no title to the coal passed which could be enforced in replevin by the purchasers; and that the remedy for breach of contract of sale was in a different action.

Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, and TRUNKEY, JJ. WOODWARD J., absent.

Error to the Court of Common Pleas of Washington County.

Replevin by J. B. Sneathen and B. F. Wilson, partners, trading as J. B. Sneathen & Co., against J. W. Grubbs & Co.

The facts, in substance, were these.

In August 1875, the defendants made with plaintiffs the following agreement in writing:

“PITTSBURGH, August 10th, 1875.

“We have this day agreed to load for Sneathen & Wilson, and deliver in their landing at the Point, two (2) barges coal from our mines near Greenfield, Washington County, Pa., price to be four and one-quarter ($4\frac{1}{4}$) cents per bushel, Cincinnati or Louisville gauge. Terms cash when delivered in Pittsburgh, free of all charges.

(Signed)

J. W. GRUBBS & Co.

It appeared that the coal was to be delivered at the first rise of the river. The barges were delivered to the defendants, who took them to their works and loaded them, but could not return them to Pittsburgh on account of the low stage of water. On the 21st of September, 1875, while the loaded barges were lying at defendants' works, J. W. Grubbs, one of the defendants, filed his petition in bankruptcy. A few days prior, however, a number of creditors who had judgments before justices of the peace, had executions issued thereon and levied on the barges of coal, but were restrained from proceeding therein by an injunction issued by the United States District Court. The barges not having been returned to plaintiffs, they, on the 16th November, 1875, issued a writ of replevin, and the barges, with the coal therein, were delivered to them. Afterward the execution creditors presented their petition to the court, praying leave to intervene, which was allowed.

In their general charge the court, *inter alia*, said:

Now from the forms of this contract and the undisputed fact that the coal had not been delivered in whole or in part to the plaintiffs when they brought their action, I feel bound to instruct you, as a matter of law, that, as to the coal,

the property therein had not passed to the plaintiffs, and consequently that they are not entitled to damages for its detention. As to the coal, therefore, you should find that the property was in the defendants, and you will assess damages to the defendants for the detention of the coal by the plaintiffs from the 16th of November, 1875, to the date of your verdict, and the measure of the damages will be the interest on what you may estimate as the value of the coal from November 16th, 1875, to the present time.

“This instruction may seem to you to be a hardship to the plaintiffs, but it results logically from the rule of law that in a sale of personal goods and chattels the property therein does not pass to the buyer so long as anything remains to be done to it by the seller.”

Verdict for plaintiffs for damages for detention of barges \$120, and for defendants \$522.98 interest on the value of the coal. Plaintiffs took this writ, and for error, *inter alia*, assigned the above portions of the charge.

JOHNSTON & FETTERMAN, for plaintiffs in error.

The facts do not present the case of a simple contract for the sale of a chattel and non-delivery thereof by the vendor, but do show that the defendant agreed to load a barge, to be furnished by plaintiffs, with coal for the plaintiffs, and afterward to return or deliver the barges with the coal to plaintiffs at a place designated, and the aggregate value thereof to be dependent upon the sale thereof in one of two markets.

It is conceded that by the mere agreement to load the barges with coal, no property in the coal vested in plaintiffs; but after the coal was mined and separated from the other coal by defendants and loaded into the barges of plaintiffs, there was such an appropriation of it to the contract by the defendants that the property therein became vested in the plaintiffs, subject only to the right of the defendants to be paid therefor as soon as the quantity was ascertained. The position we assume is fully sustained by authority: *Rugg v. Minett*, 11 East, 210; *Langton v. Higgins*, 4 Hurlst. & N. 402; *Aldridge v. Johnson*, 7 E. & B. 885; Benjamin on Sales, Secs. 358, 359, 370; *Dennis v. Alexander*, 3 Barr. 50;

Golder v. Ogden, 3 Harris, 528; *Winslow v. Leonard*, 12 Id. 14; *Hutchinson v. Hunter*, 7 Barr. 140; *Records & Co. v. P. W. & B. Railway Co.*, 9 Phila. 55.

CRUMRINE & DONNAN, for defendants in error.

To determine this question of the passing of title, well settled rules of law have long since been established and are constantly applied by the courts; two of which rules, as stated by Blackburn 151, 152, and discussed by Benjamin, Sec. 318 *et seq.*, are as follows:

1st. Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.

2d. Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend upon the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they ought to be accepted.

The contract imposed a further duty upon the defendants after the coals had been loaded in the barges, to wit, to transport them into plaintiffs' landing, which was the only place where plaintiffs were bound to accept them as in a deliverable state; property in them had not passed to plaintiffs when they were seized and delivered under the writ of replevin. This position is fully sustained by the following authorities: *Acraman v. Morrice*, 8 C. B. 449; 1 Langdell L. C. on Sales, 676, 681; *Logan v. Le Mesurier*, 6 Moore, P. C. 116; 1 Smith's Leading Cases, 148; *Shaw v. Nudd*, 8 Pick. 9; *McCandlish v. Newman*, 10 Harris, 460; *Lester v. McDowell*, 6 Id. 91; *Nesbit v. Burry*, 1 Casey, 208; *Nicholson v. Taylor*, 7 Id. 128; *Thompson v. Franks*, 1 Wright, 327; *Rochester Oil Co. v. Hughey*, 6 P. F. Smith, 322; *Bigley v. Risher*, 13 Id. 152; *Mitchell v. Commonwealth*, 1 Wright, 187.

PER CURIAM.

Delivery of the coal in these cases had not taken place, and all the terms of the contract of sale had not been performed. No title to the coal passed which could be enforced in replevin by the purchasers. The remedy in breach of the contract of sale was in a different action.

Judgment affirmed in each case.

1. Weighing, marking and setting aside goods are evidences of delivery, but not essential to it: *Winslow v. Leonard*, 24 Pa. St. 14.

2. Delivery to one partner is delivery to all: *Kenney v. Altvater*, 77 Pa. St. 34.

3. Party ready to deliver must notify the party ready to receive: *Cullum v. Wagstaff*, 2 M. R. 573.

4. Liability of common carrier continues until delivery, or property deposited or stored: *Rice v. Boston Corporation*, 2 M. R. 419.

THE DEXTER LIME ROCK COMPANY V. CHRISTOPHER
C. DEXTER ET AL.

(6 Rhode Island, 353. Supreme Court, 1859.)

¹ **Meaning of "Ledge" as used in charter, construed with context deeds and collateral evidence.** Certain proprietors, unable to work their lime-rock as tenants in common to their satisfaction, became incorporate by special legislative charter, which divided their interests into 352 shares in the nature of stock. The contention arose as to the limits of, or as to what was included in the term, "Dexter Ledge of Lime Rock" used in the said charter. The company contended that it included all the lime-rock on the farms of the incorporators; defendants insisted that it was confined to the great ledge or hill: *Held*,

1. That if the term "Dexter Ledge of Lime Rock" had acquired a settled meaning as including certain rock of definite extent such lime-rock only was intended, parol evidence being allowed to show such meaning.

2. That construed with relation to the testimony and the context, it included not only the great ledge, or hill, but what went sometimes by the name of the Hacklestone Ledge—but that it did *not* include the whole *limestone formation* on the lands referred to.

3. The meaning is to be got from the circumstances attending the transaction, and the intent of the parties, rather than from a strict geological interpretation of the words used; the intent to cover the whole stratum is negatived by the use of specific terms of boundary.

² **Signification of "Ledge."** The term "ledge" discussed with reference to "hill or elevation," "layer or stratum" and "rock in place."

Loose rock reserved. When the words of grant carry only rock in place the exception of the loose rock is simply inoperative.

Statements of one, do not bind other, co-tenants. The representation of one tenant in common as to the extent of the subject of the grant of himself and his co-tenants, can not amount to an estoppel against his co-tenants; nor against himself unless acted upon by the purchaser.

Bill in equity to enjoin the defendants from quarrying limestone upon their farm in Smithfield, commonly known as the Christopher Dexter farm, and for an account of the lime-stone already by them quarried there; the bill claiming that the complainants are the exclusive owners of the Dexter Ledge of Lime Rock, so-called, extending under said farm. In 1761, John Dexter owned a large tract of land in Smithfield,

¹ *Stevens v. Williams*, 1 M. R. 566.

² *Stevens v. Gill*, 1 M. R. 576.

containing a stratum of lime-stone, and in that year divided it into two farms, one of which being the westerly part of said tract, he conveyed to his son Jonathan, and the other to his son William; each having, by the terms of the deeds, the free liberty to dig lime-stone for burning lime in the land of the other. In 1804, the farm of William had passed by several mesne conveyances, embracing more or less of the right to dig lime-rock in both farms, to Christopher Dexter, and on the 31st day of March of that year Jonathan conveyed to Christopher "the full one half of all the great ledge or hill of lime-rock situate in Smithfield aforesaid, on my homestead farm, and a little southerly from my dwelling-house, which I have or ought to have, together with one half of all the ledge of lime-rock, lying easterly from said dwelling-house and northerly from the driftway leading from said great ledge to the lime-kilns * * * always excepting and reserving to myself, my heirs and assigns forever, all the scattering lime-rock which is or may be found on my homestead farm; and further, it is the meaning and understanding of this deed, that neither the grantor nor grantee aforesaid shall sell or dispose of any of the said ledges of lime-rock without the consent or agreement of each other." On the same day Christopher conveyed to Jonathan "the full one half of all the great ledge or hill of lime-rock situate in Smithfield aforesaid, on the homestead farm of the grantee, and a little southerly from said grantee's dwelling-house, which I have, or ought to have, together with one half of all the ledge of lime-rock lying easterly from said dwelling-house and northerly from the drift-way leading from said ledge to the lime-kilns * * * always excepting and reserving to myself, my heirs and assigns forever, all the scattering lime-rock which is or may be found on my said homestead farm, and furthermore, it is the meaning and understanding of this deed, that neither the grantor nor grantee aforesaid shall sell or dispose of any of the said ledges of lime-rock without the consent or agreement of each other."

In 1854 the Jonathan Dexter farm had become vested in George L. Barnes, as trustee, under the will of John Dexter, and in Francis G. M. Dexter, a minor, whose guardian was Israel Sayles; and the Christopher Dexter farm had become vested in Christopher W. Kelly, as assignee of Christopher

C. Dexter and Amey Dexter, under a voluntary assignment for the benefit of their creditors, and in that year, upon their petition, the following act of incorporation was passed by the General Assembly:

An Act to incorporate the Dexter Lime Rock Company.

Whereas, George L. Barnes, trustee, under the last will and testament of John Dexter, late of Smithfield in the county of Providence, deceased, Israel Sayles, guardian of the person and estate of Francis M. G. Dexter, Christopher C. Dexter and Amey Dexter, and Christopher W. Kelly, assignee of said Christopher C. Dexter and Amey Dexter, all of said Smithfield, have represented to this Assembly that they are proprietors in their individual and official capacities as aforesaid, of certain lime-rock in the following proportions, viz.: The said George L. Barnes as trustee, one quarter; the said Israel Sayles, as guardian as aforesaid, one quarter; and the said Christopher C. Dexter and Amey Dexter, and Christopher W. Kelly as assignee as aforesaid, one half, comprising in the whole, all the Dexter Ledge of Lime Rock, so called, situate in said Smithfield, and whereas they have represented to this Assembly that, owing to the various interests therein, the business of working quarries and of defining and appropriating to each proprietor his just and equal share is attended with difficulties which can be removed by legislative action, and have prayed the General Assembly to pass an act accordingly: Therefore,

It is enacted by the General Assembly as follows:

SEC. 1. The aforesaid proprietors are hereby formed into a company, by the name of the "Dexter Lime Rock Company," and by that name shall be known in the law, sue and be sued, defend and be defended against before all courts and in all places, and shall have power to appoint all necessary agents and officers, and to enact and pass all such rules, regulations and by-laws as they may deem expedient for effecting the object and purposes of said company and the business thereof, provided the same are not repugnant to the laws of this State or the United States.

SEC. 2. The property in said lime-rock and the proceeds thereof shall forever be holden in three hundred and

fifty-two shares, each proprietor shall have as many votes as he has shares, and no person owning less than one share shall be entitled to a vote.

SEC. 3. The right and interest in said lime-rock may be disposed of by will, deed, or may pass by descent, and every future proprietor shall be a member of said company so long as he or she shall hold his or her right and interest in said lime-rock, and such proprietor, and also his or her right and interest, shall at all times and in all respects be subject to the provisions of this act and to the rules, regulations and by-laws of said company, made pursuant thereto.

SEC. 4. No present or future proprietor shall ever hereafter, by himself, his agents, servants or lessees, dig, take, burn, or in any way whatever work or dispose of any of said lime-rock, or in any manner whatever interfere with the digging, taking, burning, working, or disposing of the same, but the said lime-rock and the proceeds thereof, shall forever hereafter be holden, considered and managed as company property, and shall at all times be dug, taken, burned, worked and disposed of, and managed in all respects by the said company, and under their authority, pursuant to such rules, regulations and by-laws as said company shall enact and pass by two thirds of the votes of the proprietors.

SEC. 5. Said company shall keep fair and particular accounts of all the lime-rock that shall be dug, taken, burned or disposed of by them, and under their authority, and of the proceeds thereof, and of all the expenses attending the same, and shall once in every year, and oftener if thereto required by two thirds of the votes of the proprietors, make a dividend and distribution of the profits of the business among the said proprietors, in proportion to their right and interest therein, and said accounts shall at all times be open to the examination of the members of said company.

SEC. 6. All executions that shall issue against said company shall be levied on said lime-rock or on any other property, whether real or personal, belonging to said company.

Sections 7, 8 and 9 are not material to the case.

The Dexter Lime Rock Company being thus formed, 176 shares, out of the 352 shares into which its property was divided were by agreement set off to Christopher C. Kelly.

assignee, who conveyed them by several deeds, in parcels, to the present members of the plaintiff corporation prior to Oct. 28, 1856, on which day he reconveyed to his assignors all his remaining interest in the assigned property, including the Christopher Dexter farm, with such rights to the lime-rock underlying the same, if any, of which he had not been divested by his previous conveyances.

Kelly's deeds of his shares, recite in terms, that the capital stock of the company comprises "The Dexter Ledge of Lime Rock, so called, situated in said Smithfield, the engines, apparatus and implements for working the *quarries* and burning of lime, the kilns and appurtenances thereto appertaining, and all the lands formerly held by the late Christopher Dexter and John Dexter in common for the purpose of building kilns and depositing lime-rock, wood or other materials thereon, with all the rights, privileges and appurtenances in any way thereto appertaining."

The answer admitted that the defendants, owners of the Christopher Dexter farm, were quarrying limestone underlying the same, being no part, as they claimed, of the *Dexter Ledge*, so called—the right to quarry which was admitted to be exclusively vested in the complainants.

Much testimony was submitted for the purpose of proving the extent and limits of what was called and known as the "Dexter Ledge of Lime Rock," and concerning localities and the working of the quarries by the former owners, which served to explain the descriptive parts of the deeds produced—and testimony was also submitted upon the point of estoppel taken by the complainants; but as this is sufficiently stated in the opinion of the court, it is omitted here.

THURSTON, for complainants.

WEEDEN & BLAKE, for respondents.

BRAYTON, J.

The right of the plaintiffs to the injunction which they ask depends upon their title to the lime-rock, locally situate on the land of the defendants, where they are now digging and propose to continue digging lime-rock. If they establish

their claim to the exclusive right to the rock, the defendants must be enjoined from further excavating, burning or using the lime-stone there.

The right to the rock has never been conveyed to the corporation by deed executed by the owners of such lime-rock, but the plaintiffs claim, that the title to the premises in question vested in them by the act of incorporation, which declared what should be capital stock. The charter declares that certain lime-rock shall constitute the capital stock, and that it shall be owned by the petitioners or corporators in the same proportion as they owned the rock at the time they petitioned. The question is, what was the extent of that lime-rock which was made capital stock and as owners of which the petitioners asked to be incorporated? The plaintiffs say, that the corporate stock included all the lime-rock then upon either of the farms owned by the petitioners; that the intent was to include in such stock all the lime-rock, and the right to dig and take the lime-rock upon both farms, which was held by the petitioners in common, and that it included the lime-rock at the defendants' present quarry.

The defendants say, that not only was no lime-rock upon the Christopher Dexter farm included, but that nothing was included and made corporate property by the act of incorporation except the great ledge or hill of limestone, and that was wholly upon the Jonathan Dexter farm; that the petitioners prayed to be incorporated only as they were owners in common of so much lime-rock as was called and known by the name of the Dexter Ledge of Lime Rock; and that no other lime-rock was called or known by that name except the hill of lime-rock, which did not extend into the Christopher Dexter farm; and the charter declares no other lime-rock to be corporate property.

Had the term, "Dexter Ledge of Lime Rock," as used in the charter, acquired a settled, definite meaning, well understood in the community as including certain lime-rock of definite extent and excluding all other, we should be obliged to hold that such lime-rock only, was covered by the charter, and we could not consider any general intent of the corporators to have included more or to have included less. If the term so defined and settled had included the hill of lime-rock upon

one farm only, the charter could have included no rock on the other farm. In looking at the testimony submitted as to what was called or known by the name of Dexter Ledge of Lime Rock, in connection with the language of the petitioners in their application for a charter, the defendants failed to satisfy us that the term Dexter Ledge of Lime Rock was, in the contemplation of the parties, confined to the ledge on the Jonathan Dexter farm only, although the evidence shows, we think, quite clearly that that term was more generally applied to the great ledge or hill of lime-rock, and generally, to that ledge as the Dexter Ledge, yet that it was sometimes extended to the smaller, or Hacklestone Ledge.

It can hardly be claimed, if we regard the language of the petition and of the charter, that the parties to the act of incorporation intended to limit the charter to the great ledge. The language very clearly implies that they did not. The petitioners say that they are the owners in certain proportions of certain lime-rock, comprising, in the whole, all the Dexter Ledge of Lime Rock; that they had experienced a difficulty in the business of working the quarries and defining the just shares of each to the rock taken therefrom. They speak of quarries in the plural and not of one quarry only. There was at the great hill or ledge but one quarry. There was another and but one other at the smaller or Hacklestone Ledge. Both the quarries had been at some time worked in common. These quarries are spoken of in connection with the Dexter Ledge of Lime Rock and as parts of the Dexter Ledge which were owned in common. They must have understood that the rock at both pits was included in the Dexter Ledge, the difficulties in the working of which they desired to obviate by this legislative act. The plaintiffs claim even more than the two quarries, and that the act of incorporation included all the lime-rock of the same formation as the rock at the quarries, to whatever point it might be continued, and that the term "Dexter Ledge" included all such rock, wherever it might be.

Our inquiry should naturally be, what was called and known as the Dexter Ledge of Lime Rock? How extensive was the rock, called and known by that name? The plaintiffs have offered no evidence upon this point, except in re-

buttal of that offered by the defendants to show that it was confined to the great hill of lime-stone. That which they did produce was merely to prove that no locality was known by that name; but it failed to prove that that term was ever used in the indefinite sense here claimed, as including all the rock of the same formation with that at the quarry opened. There is no witness who says this, or, that the term was ever applied in fact to more than the two quarries thus open, the one on the Jonathan Dexter farm, the other on the Christopher Dexter farm, both of which had been worked by the Dexters and owned in common by them. No witness says it was ever applied to the Briggs Ledge, on the west part of the Jonathan Dexter farm. To determine, however, the extent of the plaintiffs' right to lime-rock on the Christopher Dexter farm and whether it extended to the quarry opened by the defendants, it became necessary to determine the extent of the lime-rock owned by the parties to the act of incorporation, as tenants in common. The plaintiffs say that this is to be ascertained by the mutual deeds executed by Jonathan and Christopher Dexter in 1804; and the question arises, what interest passed to the respective parties upon the proper construction of these deeds? These deeds should be construed in the light of all the circumstances surrounding the transaction, in order fully to understand the application of the language used, and determine the sense in which it was used.

From the exhibits and proofs in the cause, it appears that one John Dexter, in 1761, was the owner of both these farms. He had, in 1753, leased for the term of ninety-nine years a portion of the great ledge or hill of lime-rock, to certain parties, ten rods in breadth extending through the hill, and had in this lease reserved the right to dig lime-rock sufficient for the use of one kiln, then proposed to be built upon his own land. He covenanted not to dispose of any other lime-rock which might be obtained from the farm, to the injury of the lessees who had the right to dig and burn lime during the lease. John Dexter, in 1761, divided this farm into two parts, giving to Jonathan, his son, one of the parties to the deed of 1804, the westerly part, and at the same time granting the free liberty to dig lime-stone for burning lime on the other or easterly part. On the same day he conveyed to William

Dexter, another son, the easterly part, with like free liberty to dig lime-rock upon the farm given to Jonathan. The right and title of William Dexter seems to have passed by several mesne conveyances to Christopher Dexter, the other party to the deeds of 1804. In 1804, when these deeds were executed, there was a hill situated upon the westerly or Jonathan Dexter farm, a little southerly of the dwelling-house, descending easterly and coming to the level before reaching the westerly line of the Christopher Dexter farm and situate wholly on the Jonathan Dexter farm. This hill was composed of lime-rock, and was, according to the testimony of the witnesses, from thirty to forty or fifty feet above the general level of the land, and had been excavated extensively, some parts of it below the surface; and there was a drift-way leading from the place where the hill had been excavated, easterly to certain limekilns upon the Christopher Dexter farm. To the eastward of the dwelling-house of Jonathan Dexter, and upon the Christopher Dexter farm, and north of the drift-way and coming up to the side of it, was an open quarry of lime-rock. This had been excavated to a considerable depth below the surface; and though the rock at the way rose to the surface, there was no elevation here of the land or of the rock. There was also upon the westerly part of the Jonathan Dexter farm another quarry of lime-rock, called the Briggs Ledge, which does not appear to have been worked at any time, by Christopher Dexter or by his predecessors.

The plaintiffs claim that by these mutual deeds between Jonathan and Christopher Dexter, Christopher Dexter conveyed to the said Jonathan one half of all the lime-rock upon his, the said Christopher's, farm, which was what is termed by geologists "rock in place," as distinguished from boulders or detached rock removed from the place of its original formation; that by the term Great Hill or Great Ledge of lime-rock, situate on the homestead farm of the grantee a little southerly of the grantee's dwelling-house, all the connected rock of that formation of lime-stone passed wherever it might extend, whether upon the grantee's farm, or upon land of the grantor.

The claim of the plaintiffs is founded upon the assumed sense in which the term Great Ledge, was used in these deeds.

They claim that it was used in the sense, and with the definition of *layer* or *stratum* of lime-stone, and therefore included all of the layer or stratum which is continuous and unbroken, of which the hill is part; and as this formation extends into the Christopher Dexter farm, and under the meadow where the defendants are now working, the rock there passed also.

We may assume for this purpose, that the same formation extends from the great hill to the pit or quarry of the defendants, and we think the evidence shows that the rock in both places is of the same formation. But it does not aid the plaintiffs in the construction of the deed. If we substitute the definition of the word ledge, as claimed by them, for the term itself, we still meet with the same difficulties. We then have the one half of a great layer or stratum, or hill of lime-stone upon the grantee's farm, a little southerly of his dwelling-house; some significance must be given to the term "hill of lime-stone," for it is evidently used as synonymous with ledge, and as descriptive of the subject. If the parties intended to include the whole formation, and to extend beyond the hill easterly and indefinitely, the word hill ceases to have any meaning, and must be rejected; and so we must also reject that part of the description which describes it as situate southerly of the dwelling-house; for this would give it a location easterly as well as southerly from the house, and include the smaller ledge, which is described to be situated easterly; and we should be driven one step further, that is, to reject that part which describes the lime-rock conveyed as being upon the grantee's farm. The description then would be simply, the one-half of a great stratum or layer of lime-rock without any locality—a description so indefinite that parol proof alone could ascertain what was granted or intended to be.

It is said, indeed, that the parties understood at the time that the formation at the great ledge extended into the Christopher Dexter farm and perhaps entirely across it, and included the smaller or Hacklestone Ledge also, and therefore it must be presumed that the parties intended to convey to each other all their property in the entire formation. They might well enough have presumed that the lime-rock at the

great hill extended to the smaller or Hacklestone Ledge, for the distance between them was very small, and that they were both parts of the original formation, though the parties were probably little versed in geology, and it is at least doubtful if they were familiar with the term "rock in place," as used by geologists. There was less indication of lime-rock at the meadow where the defendants now work, or that the formation extended there, since no pit had been opened; and we can not determine whether they did, or did not, have the opinion imputed to them as to the actual extent of this lime formation. But suppose they had; this does not relieve the difficulty, for the question immediately forces itself upon us, why should they, if they intended to convey the whole, use such description as is appropriate to a part only? Why use the term "hill" at all, or describe it as upon one farm only, when it was in fact upon both, or as southerly of the dwelling-house, when it extends far to the east, and even in that view most probably included the position of the dwelling-house itself? But the descriptive part of the deed certainly leaves us to imply that the deeds were not made upon any such opinion. There were two subjects of grant in these deeds: The great ledge is treated as one, and the ledge situated easterly of the dwelling-house is treated as another distinct subject. This last is situate (so the deeds say) north of a drift-way leading to the first, viz.: the great ledge or hill of lime-rock; indicating that the great ledge was intended to be described as local and including only lime-rock on the Jonathan Dexter farm, and not the lesser ledge, along the southerly side of which the drift-way led. And, upon the whole, we are driven to one of two conclusions, either of which is fatal to the plaintiffs' view; either, that they considered, at the time, the lime-rock at the great ledge and that at the smaller ledge, easterly of the dwelling-house, as different formations, or else that they intended to describe and convey different and distinct portions of one entire formation; and it is quite immaterial which view be taken. This is the more apparent from the description given of the several subjects of grant. It is, one half of the ledge of lime-rock lying easterly of the grantee's dwelling-house, and northerly of the drift-way leading to the great ledge. By no rule of construction can this

grant be carried south of the drift-way. It would be a perversion of terms to do so. The drift-way is to be the southern boundary of this second parcel of lime-rock, regardless of the extent of the formation of which it might be part.

The defendants on their part say, that the term ledge, as here used, includes the idea of prominence or projection, either upward, when it is sometimes called a ridge, or projecting horizontally—jutting out from—and therefore the term is here used in the sense of *hill* or *elevation* of lime-rock; and so every separate hill, or elevation of lime-rock, may be termed a ledge, within the meaning of that term as here used by the parties. The description of the first subject of the grant evidently does include this idea of a prominence of rock; but in the description of the second subject the idea of elevation, or ridge of rock, is as evidently excluded. This locality had no prominence or elevation. It was on the general level of the land, and though the lime-rock originally came to the surface, and still did at the drift-way, it had long before been excavated far below the surface elsewhere. The term here did not mean hill, ridge, or elevation of rock, but simply a body of lime-rock, lying easterly of the house and north of the drift-way,—all the rock there. It is indefinite in extent, except that it does not extend west of the house, or south of the way. It is difficult to give this term, ledge of lime-rock, as used in reference to both subjects of the grant, any other meaning than, a body of connected lime-rock, whether hill or valley, or upon the general level with the land, and reconcile it with the language here used by the parties. The terms, great ledge or hill of lime-rock, must be construed to be, all that body of connected lime-rock locally situate southerly of the dwelling-house of Jonathan Dexter, and upon his farm, and not extending beyond it easterly. But at the same time, the term ledge, applied to the other subject of grant, since there are no words limiting it except the drift-way on the south, may be used in the larger sense, as including all the body of connected lime-rock upon the grantor's land which lies north of said drift-way.

This construction would not include the meadow south of the drift-way, and easterly of the Jonathan Dexter farm, where the defendants are now excavating rock. It has been

suggested that by this construction no effect is given to the reservation contained in the deed, viz.: "always excepting and reserving to myself, my heirs and assigns, all the scattering rock which is, or may be found upon my farm;" and the plaintiffs say that this reservation shows that the grantor did not design to retain to himself any of the rock in place, so-called, but detached rock only; what geologists term boulders; rock removed from the original formation and separated from the mass of connected rock. It may be said in regard to this, what could not have escaped the notice of counsel, that in the extended sense which he would give to the term in the deed, as conveying all the rock in place upon the grantor's farm, the loose rock or boulders can in no proper sense be included. It is no exception to anything which could have passed by the general description in the deed; boulders could not, with any propriety, be deemed, in any sense, rock in place. Looking at it in this light, the exception is simply inoperative, and that equally, whether the rock in place described in the deed be upon the grantee's farm only, or be extended into the land of the grantor. But it may be said also, what is apparent from this deed, that Christopher Dexter did clearly grant a connected body of lime-rock locally situate upon his own farm, by the description, "ledge of lime-rock, situate easterly of the dwelling-house and north of the drift-way." If the terms of the reservation are to be considered as excepting anything which could otherwise pass, and as excepting part of the rock described, and "detached rock" is an exception from the grant of the ledge, full operation is given to the reservation in application to the rock granted north of the drift-way. It is said by the plaintiffs in the argument, that the intent of these deeds was to make the parties equal as to their right to lime-rock on both farms.

These deeds were made between father and son, and it would seem in anticipation of a conveyance by the father to another son, to whom he did convey his interest in 1809. At the time of the execution of the deeds, Christopher Dexter, the son, was the owner of the greater portion of the farm conveyed to William Dexter in 1761. It may be that he owned the whole; this is not made certain by the conveyances. The right granted to William Dexter to dig

lime-rock from the western farm, if it vested in Nathan and Samuel, the sons, by the devise of the farm, had by the deed of Nathan, in 1783, to Jonathan, become extinguished. Jonathan Dexter, by the same conveyance, acquired, not a mere right to dig lime-rock, but a property in one half the lime-rock on the eastern farm, and in consequence thereof the mere right to excavate and take lime-rock from that farm, granted in 1761, became extinguished.

The purpose of the deeds of 1804, as understood, and as the plaintiffs urge, was to define the rights of the parties, and to make their interest in the lime-rock equal; and it is apparent from the deeds themselves, that the equality was to be accomplished by vesting in the parties the property in the rock itself, and to make them tenants in common of all the rock in which they were to have an interest. To do this, some rights were to be created or granted anew, some to be released. That common interest in the rock on the western farm, designed to be vested in Christopher Dexter, was to be newly granted by the deeds, and the deed of Jonathan does convey one half of the great ledge of lime-rock on that farm, he reserving, and Christopher agreeing that he shall retain, all the scattering rock then apparent or to be thereafter found on that farm; and since no rock is included in the description except the great hill of lime-rock, this reservation is in effect, of all other lime-rock on that farm. Without the reservation the effect would be the same. Christopher Dexter's deed purports to convey to Jonathan one half of the ledge of lime-rock lying north of the drift-way on his farm. It is at least doubtful if this deed conveys to Jonathan any greater right to lime-rock on the easterly farm than he before had. The deed to Nathan Dexter, made to him in 1783, purports to vest in him one half of all the lime-rock on that farm. By the deed of 1804, the grant, instead of being a grant of one half of all the lime-rock, is limited to one half of the ledge. By these mutual deeds Christopher Dexter reserves to himself, and Jonathan agrees that he shall retain to himself, all the scattering rock which then was, or which might thereafter be found upon his farm,—in effect all other lime-rock upon that farm, except what was described and purported to be conveyed.

It is claimed, further, that the acts and declarations of Christopher C. Dexter, about the time of procuring the charter, and in endeavoring to effect a sale of shares in the corporation, estop, not only Dexter himself but all the defendants, to deny that the lime-rock incorporated, extended to the place where they are now excavating. These representations, as charged, consist in representing that the rock of the corporation extended under the meadow and under the whole farm of which he was part owner.

If the other parties to this act of incorporation have been by representations of the defendants misled to their injury, and upon the faith of such representations have been induced to vest their money or their property in the stock of this company, and must now suffer loss unless such representations are held to be true, the general rule of law would require that the defendants should be estopped to deny that they were true.

The objection in his case is, first, that the representations were not made by all the defendants or by all the owners of the rock claimed, but by one tenant in common only, and the remedy asked can not be given without at the same time doing an injury to the other tenant in common, who is not responsible for the representations made; it would be in effect compelling A to make good B's default. There is another objection, that while Christopher Dexter, one of the defendants, was making the representations here charged, other members of the corporation, and who became such by virtue of their ownership of lime-rock on the western farm, were making representations of precisely an opposite character; that no lime-rock upon the farm was designed to be made corporate property except the ledges then worked, and that it was not intended to include other lime-rock. There is a third objection, that whatever the representations were which were made by C. C. Dexter, it does not appear that the corporation, or any member of the corporation, was misled by them, or ever acted upon them, either in applying for the charter or in the purchase of stock in the corporation.

The plaintiffs having failed to establish their right to the lime-rock which the defendants are excavating, this bill, which prays that the defendants be enjoined from further excavating, must be dismissed with costs.

SNODGRASS V. WARD.

(3 Haywood, 40. Court of Errors and Appeals of Tennessee, 1816.)

Privilege extended by local evidence of description. Articles of agreement were made for erecting iron works. Such articles called for a conveyance of a half interest in five acres, part of a certain 100 acres called the Cat-tail Meadow. Such 100 acres were parcel of one 640-acre tract at that time. The articles further provided "that Snodgrass shall have free privilege of timber necessary for coal and building that may be requisite for said works:" *Held*, that evidence of the local situation of the entire tract was admissible, and that the privilege would extend to the entire tract.

Personal liability where title fails to pass. And it was further *Held*, that the articles did not prevail against a deed to a stranger, though the maker was personally liable on the articles to make good his privilege.

PER CURIAM.

Ward sued Snodgrass in the County Court of Carter, in an action of trespass for prostrating and destroying his trees.

The defendant pleaded not guilty; and secondly, that the place where, etc., belonged to the father of Snodgrass, who entered by his father's command, which is the same trespass, etc. Replication that the place where, etc., was the soil and freehold of the plaintiff, and not the close of James Snodgrass, and that the defendant did not enter the close, etc., as his servant; upon this issue is joined. Verdict for the plaintiff, and judgment, and the defendant appealed to the circuit court. In September term, 1816, there was a verdict in the circuit court for the plaintiff, a bill of exceptions was filed, an appeal taken to this court, and errors assigned.

The bill of exceptions states a deed produced by the plaintiff, on the trial, from Johnson to him, for 640 acres of land. This land, it was proved the plaintiff purchased from John Wills, who had a deed from Johnson, unregistered. Johnson, at the request of Wills, took back this deed and conveyed the same lands to the plaintiff. It was also proved that this land joined a hundred acres called the Cat-tail Meadow, on which hundred acres the defendant's father and said Wills erected a forge in partnership; before which partnership Wills had purchased the said 640 acres.

That Snodgrass used it for some years, cutting timber on it

for the forge, Wills acquiescing. On this tract of 640 acres, the trespass declared of was committed. Whilst the title was in Wills, articles were made between the father and Wills, for erecting said iron works, dated the 16th of April, 1808, by which Wills is to convey to Snodgrass the one half of five acres of land, part of a 100 acres, called the Cat-tail Meadow; and amongst others, there is a clause "that Snodgrass shall have free privilege of timber necessary for coal and building, that may be requisite for said works, for his part of the same likewise," etc. The defendant offered in evidence two depositions, which the court rejected. These depositions explained the articles so as to make them comprehend the 640 acres as part of the land on which Snodgrass was to take timber. Evidence describing the property where a deed speaks of property contracted about, is admissible to enable the court to apply the deed to it or not, according to the words of the deed; but it is not admissible to show that the meaning of the terms contained in the deed extends to it or not. Therefore the depositions were properly rejected, and the evidence to show the local situation of the 640 acres, and other parts of its description was proper. The court is of opinion that the words of this article did extend to the 640 acres, for that and the 100 acres were all one tract at the date of these articles.

Timber requisite, etc., does not confine him to any particular part of the land, but leaves him at liberty to take it from any part. He might as well be confined to the 640 as the 100, and thus alternately he could be excluded from both. But when we have progressed thus far, what next is to be done? These articles do not give an interest in the land; they only make Wills personally liable for a breach, and if he convey the land to a third person, it is in his hands exclusively, his own against all mankind, the articles notwithstanding, and he can maintain an action against any who shall trespass upon it.

The defendant's remedy is upon his articles against Wills.

Judgment for the plaintiff in the circuit court.

JOHNSTON ET AL. V. SHELTON ET AL.

(4 Iredell Eq. 85. Supreme Court of North Carolina, 1845.)

¹ **Vague entry, insufficient—Notice.** An entry so vague that it affords no notice to a second enterer, who both surveys and pays before the first entry is made sufficiently specific, is void as to such subsequent entry.

Insufficient description. An entry of "640 acres beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's Bear-pen on the Hogback mountain and running various courses, for complement," is in itself too vague and indefinite; it would amount to a floating right.

An entry must amount to notice. An enterer has no equity or collateral claim independent of the entry; the entry should be definite in itself or be made so by a survey, otherwise it gives no notice to affect the conscience of others.

Cause removed from the Court of Equity of Haywood County, at the Fall Term, 1845.

The case, as far as concerns the questions determined in the Supreme Court, was as follows:

On the 30th day of August, 1842, the plaintiffs made their entries, in the office of the entry-taker of vacant land in the county of Haywood. The first was, "No. 1440, for 640 acres of land, beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's Bear-pen on the Hogback mountain and running various courses for complement." The two others were each for 640 acres adjoining the first; the one lying east, and the other north of it, the Hogback mountain was in a wild tract of country, nearly all mountains, but little explored, and having very few inhabitants.

The object of the plaintiffs in making the entries, was to obtain lands that were then supposed to be rich in minerals, and particularly gold, at the heads of Tuckasegee river; and about the same time, they entered a number of tracts on the opposite side of the line, in Macon. The plaintiffs were unacquainted with the part of the country in which the lands

¹ A gold mine had been discovered and was "the bone of this contention" between the date of the plaintiffs and defendants' entries. An "entry" was the original notice preparatory to perfecting title to North Carolina public land and corresponds in many particulars to the present district or county record of a mining claim.

were situate, and received from other persons the information, on which they selected the locations and descriptions of their entries. The Hogback mountain consists of two distinct knobs, now known as "The Hogback" and "The Little Hogback," extending together about four or five miles, and having between them a deep depression or gap, two miles wide or near it; though formerly, both knobs were known by hunters as "The Hogback," simply, and it so continued, as understood by some persons, to the beginning of this controversy. The Big Hogback and the Little Hogback are both in the line between Haywood and Macon, which there runs nearly east and west for six or seven miles. On the former was a Bear-pen, which was known to some as "Lowe's Bear-pen," and to others as the "Locust Bear-pen;" and west from the Little Hogback, near the county line, there were two Bear-pens, that had been built by a hunter, named Lowe, which were within six or seven hundred yards of the western foot of the Little Hogback mountain, in a valley or gap of the Blue Ridge.

In September, 1842, the defendants, Reeves, Shelton and C. Hooper, made an entry of 640 acres lying also on the county line west from the Little Hogback somewhat more than a mile and running north from the county line, and then west, south and east to the beginning. At the time they made their entry, they saw the previous entries of the plaintiffs; but they say that, from their knowledge of that part of the country, they believed their entry would not be within five miles of the plaintiffs' land as described in their entries; and that, when the entry-taker saw the defendants' entries, he was of the same opinion. Thereupon the defendants made their entry.

At the same time, they took copies of the entries of the complainant, in order that they might submit them to the judgment of others, as to the lands they would cover, and with the intention of abandoning their own entry, in case it would interfere with the plaintiffs' entries. At that time, the defendants had discovered near the county line a deposit gold mine, and it was the object of their entry to obtain a grant for it; and their entry was so laid as just to include it in the south-east corner of the tract, being that part of it which lies nearest to the entries of the plaintiffs. The defendants

state that they made inquiry of several persons as to the location of the plaintiffs' beginning, and they were satisfied from the information obtained, that it was at the Bear-pen on the Big Hogback, which was at least five miles from the gold mine. In December following, the defendants took out a warrant and delivered it to the county surveyor, who made their survey and plat, on which they obtained a grant shortly after.

At the time of making the survey, the defendants exhibited to the surveyor, with their own entry, the copies of the plaintiffs' entries and requested him to inform them whether, from his knowledge of the country, he thought their entry would cover any land of those embraced in the plaintiffs', saying that if he thought so they would go no further, as they did not wish to lose their money or have a controversy; and the surveyor also gave it as his opinion, that the entries were for different land. The survey was then proceeded in, and, when completed, the defendants sent to Raleigh for the grant, in order to have the elder legal title, if there should be a dispute.

In the succeeding spring, the plaintiffs had their surveys made, and the survey of entry No. 1440 was so made as to include the gold mine and other parts of the land granted to the defendants aforesaid, and they paid the purchase money to the State and obtained grants also.

The beginning was in the county line at the foot of the west end of the Little Hogback mountain, about six hundred yards from the Bear-pen in the valley called "Lowe's." The bill was then filed against the original grantees of the gold mine and various lessees under them, praying that those prior grantees might be declared to be trustees for the plaintiffs, as they were the prior enterers and the others had notice of their entries, and that they might be compelled to convey the legal title to the plaintiffs, and in the mean time praying for a receiver.

A vast mass of depositions has been filed by the parties for the purpose of establishing which was "Lowe's Bear-pen," and what was known as the Hogback mountain, and at which particular Bear-pen and knob the plaintiffs meant to begin. For the purposes of the point on which the decision of the court rests, it is material only to state a small portion of it.

A witness states, that the plaintiff Johnston mentioned, when he made his entries, that he began on "the main Hogback mountain" and went out toward "the white oak flats," which are on the Tuckasegee, nearly north from the Big Hogback, and seven or eight miles from the defendants' entry. Another witness states, that, wishing to get a lease of a part of the gold mine, he went to the entry-taker's books and examined the plaintiffs' entries, and found that the beginning was at a *Locust* Bear-pen on the Hogback mountain, and that he then applied to Johnston for a lease, and inquired of him, whether his entry began on the big or the little Hogback; and Johnston replied, "that he knew nothing of the Big Hogback or the Little Hogback—that he made his entry from information, and made it special, calling for a *Locust* Bear-pen on the Hogback mountain in the county line." Another witness states that Johnston employed a man to examine the land entered by him, for gold; and to enable the person to know the land, Johnston told him, that it commenced on a *Locust* Bear-pen on the Big Hogback, and included the white oak flats.

It also appears, upon the warrant of survey issued on the entry No. 1440 that, as first written, it called for a *Locust* Bear-pen as the beginning, which was altered to "Lowe's." But the entry-taker states that he altered it, and also the entry in the same way; because in transcribing the entry on his books from the location furnished by the plaintiffs, he made an error in writing "Locust" for "Lowe's." On the other side, several witnesses state, that the persons upon whose information the plaintiffs took their locations, gave him "Lowe's Bear-pen" as the beginning, which was West from the Little Hogback, and is a different place from "The *Locust* Bear-pen," which is on the top of the Big Hogback. And it appears very clearly from the surveyor and others, that the plaintiffs did not intend to enter the particular land where the gold mine is—for it was not then discovered—nor any other covered by the defendants' grant; for neither of the plaintiffs knew the place called for as their beginning, whether that be the one Bear-pen or the other, nor any of the land subsequently included in their survey and grant.

Indeed, when the plaintiffs went to survey, they could not

designate to the surveyor their beginning, and had to call on one Hooper to point it out. He designated "Lowe's Bear-pen in the gap," as that which he meant in giving the plaintiffs the description by which they made their entry; though the same person, Hooper, has been examined as a witness in the cause, and in his examination says, that "the Locust Bear-pen," on the top of the Big mountain, was the one he gave Johnston for a beginning, and that he purposely deceived the plaintiffs and the surveyor, in pointing out a different one when the survey was made. After Hooper had designated Lowe's Bear-pen in the gap as the beginning, the surveyor commenced his survey at the point of the Little Hogback mountain nearest to "Lowe's Bear-pen," and laid out the land very irregularly, and so as to include the gold mine and other parts of the land granted to the defendants. To that mode of making the survey, the defendants, who were present, objected, because in fact, the plaintiffs' beginning, as described in the entry, was at a Bear-pen *on* the Big Hogback, three or four miles off; and because they, the defendants, had obtained a grant for some of the land which would be included in the plaintiffs' survey and had made their entry and survey, and obtained the grant, without the means of ascertaining from the plaintiffs' entries, whether they would interfere with the lands the defendants took up; and further, because, in point of fact, there was still a sufficiency of vacant land to give the plaintiffs their quantity, without taking any of the defendants' if they would so run their lines. But the plaintiffs insisted, that as theirs was the oldest entry, no one else could enter and survey before the plaintiffs had surveyed except at the risk of losing their land; for that the prior entry gave the plaintiffs the right to be first satisfied, at all events, and to run in any direction they might choose, from their beginning, so that they got no more than their quantity.

In obedience to the instructions of the plaintiffs the surveyor then completed the surveys, upon which the plaintiffs' grants were subsequently issued.

The cause, having been set for hearing, was transmitted to this court.

BADGER, for the plaintiffs.

W. H. HAYWOOD, AVERY & IREDELL, for the defendants.

RUFFIN, C. J.

Without wading through the voluminous depositions, or discussing the various points of fact that arise on them, the court may safely decide this cause upon the insufficiency of the plaintiffs' entry. Its vagueness renders it void as against a subsequent enterer who surveys and pays his money before the plaintiffs had made their entry more specific, if the expression may be allowed, by a survey identifying the land they meant to appropriate. The construction of the entry laws contended for by the plaintiffs, would change the meaning of them entirely from what they have been understood; and would make an entry not a mode of appropriating a particular piece of land as distinguished from all other land, but as creating a prior, and in some degree, a floating right to have a certain quantity of unappropriated land anywhere the enterer might select within the two years, on a certain stream or mountain in the county. It would consequently postpone all other persons in entering and surveying, until the prior enterers chose to make their selection, and in any form which their caprice or interest might from time to time dictate. No construction of the acts could be more erroneous or mischievous—more directly opposed to the language or the policy of the legislature. In the case of *Harris v. Ewing*, 1 Dev. and Bat. Eq. 369, the court held that a vague entry was not indeed absolutely void, because it was not material to the State to whom she granted, and the defect might be supplied by a survey which would render the party's claim more specific. Therefore, there was a decree against another enterer who made his entry after the prior vague enterer had actually surveyed, and with notice of it. That was, indeed, going beyond the words of the act upon a very liberal construction which was adopted with hesitation. It certainly can be carried no further in support of vague entries; which would be an encouragement to negligence or deception in enterers. And in that case the court used the language, that an entry ought to be so explicit as to give reasonable notice to a second enterer of the

first appropriation; and that if it do not, and the same land be entered again, the last purchaser has conscience on his side while the fault is on the other. The present case falls precisely within that rule. The plaintiffs' entry is altogether indefinite, except in quantity and except in the beginning—supposing that to be as now claimed by the plaintiffs. It is true that from its lying on the county line it is seen, that it is to be on the north of the beginning. But it does not specify anything else, and it can not be told whether the land is to be laid out by running east or west on the county line from the beginning, nor how far in either direction, neither by calls for distance, or natural objects or other lines or any other thing. It was therefore positively uncertain what lands the plaintiffs would survey, for the description bound them to nothing but a beginning, and they might shift and change as they pleased, until the time when it would lapse, unless ripened into a grant. No case could more strikingly illustrate the danger and error of the construction contended for by the plaintiffs than this very one. The entry is vague in itself, and we find a multitude of witnesses disputing about the single object designated in it, and about the plaintiffs' declarations at different times as to the point of beginning, and, moreover, it is absolutely certain that they had, when they entered or, for months afterward, no view to the particular place which is the bone of this contention.

Standing upon the entry alone, then, the plaintiffs could not recover, according to the rule in *Harris v. Ewing*. But in that case the plaintiff had made a survey and completely identified the land he wanted, and this the defendant knew before he made his entry; and upon that ground exclusively that decree proceeded. Now that circumstance operates directly the other way between the present parties; for these plaintiffs let their claim rest in their vague entry, until the defendants had made an entry and survey and got a grant. The reasoning, therefore, and principle of decision in *Harris v. Ewing* are directly against the plaintiffs in this suit. It is true that the defendants had notice of the entry of the plaintiff; but, after they read it, they could learn nothing from it. Nobody could lay it down, unless he had the plaintiffs there to say which land they chose. It is manifest, therefore,

the very subject of the entry is not designated in the entry, but by the subsequent election of the enterers. Had the defendants gone to the plaintiffs themselves for information as to the land they meant to take up (if they had been under any obligation to do so in any case), the inquiry would have been unavailable in this case; for the plaintiffs did not then know how they would have their survey made. They could only have answered the defendants that they must wait their pleasure to select the land so as, in effect, to stop all entering after the first in a neighborhood, until the title on that is completed.

But the defendants were not at all obliged to make any application to the plaintiffs on the subject. Where one is buying a legal title and has notice that a person claims an equity therein, he must take care in due time to ascertain the nature and extent of the claim. But that does not apply in a case of this sort; for an enterer has no equity or collateral claim independent of the entry itself, if the case still stands on the entry, and therefore the entry ought to give the requisite information; or at all events, the enterer ought without delay to supply its defects by an actual survey, setting apart the land entered. Then an entry, made by one with knowledge of the survey as well as of the entry, would be *mala fide*, and convert the party into a trustee. It is unquestionable, however, that these defendants did not and could not know or guess that they were encroaching on the plaintiffs' entries. For, independent of the disputes as to the point intended and understood by different persons as the beginning, according to the present call for "Lowe's bear-pen," it is certain that the entry as actually written in the entry book, when the defendants entered, called for "the Locust bear-pen," which was five miles from the nearest point of the defendants' grant. Indeed, if the call therein had been "Lowe's," and not "Locust," it would still have been impossible for the defendants by any experimental lines to have first left the land for the plaintiffs before they took that for themselves. The defendants, therefore, intended no wrong to the plaintiffs and did them no wrong. The whole wrong was with the plaintiffs themselves in not getting such knowledge of the land as to be able to give a sufficient description of it in the entry, and then in de-

laying to identify it by a survey, so as by notice of it to affect the conscience of the defendants.

Therefore, the bill must be dismissed with costs.

PER CURIAM.

Decree accordingly.

JOHNSON ET AL. V. PARKS ET AL.

(10 California, 446. Supreme Court, 1858.)

Interest of witness. In a suit to recover a mining claim which had been conveyed to the plaintiff by quitclaim deed, an objection that the plaintiff's grantor is an incompetent witness on the ground of interest, is not well taken.

Location—Mistake in course of vein. A misdescription in the notice of a claimant of a quartz lode posted up near the premises, in compliance with the mining laws of the district in which the lode was situate, calling for the vein in a south-westerly direction, when, in fact, the vein, as afterward ascertained, ran nearly due south, the lode being underground and undeveloped, will not vitiate the claim. The thing intended to be taken up was the vein, and its exact direction could not, of course, be ascertained or accurately described until the vein was followed up or explored.

Questions of abandonment and prior location are peculiarly appropriate to the jury, and where they have been fairly submitted the action of the jury will not be reviewed.

Appeal from the District Court of the Fifth Judicial District, County of Tuolumne.

This was an action of ejectment, brought to recover possession of a quartz lead. The complaint was sworn to and establishes the fact that plaintiffs had previously tried the question by action of trespass in a justice's court and obtained a verdict. A verdict was also rendered for plaintiffs in the ejectment suit in the district court. Defendants appealed.

The facts necessary to understand the points decided appear in the opinion of the court.

E. F. HUNTER, for appellant.

The court erred in permitting the witnesses, Putoff and Waterson, to testify on behalf of the plaintiffs.

They were the vendors of plaintiffs and at the time of

sale, the defendants were in the possession of the mining claim holding adversely, and their vendors, the witnesses, sold, "to keep from having a lawsuit with the defendants."

In other words, they sold to the plaintiffs, who were ready to carry on a lawsuit, and the inference is, willing, provided they would have the testimony of their vendors in order to sustain the title purchased.

The title to, or in, a mining claim is purely possessory, and is regulated by priority of possession and conformance with the rules and regulations in force at the particular locality.

The defendants at the time of sale were in possession, claiming adversely, and the evidence shows by priority of location, by a subsequent possession, and working the claim after an express abandonment by plaintiffs' vendors; and further, that plaintiffs' vendors never had located the claim in dispute, but another claim running, or supposed to run, in a different direction.

The testimony of the witnesses as allowed, went to prove a prior location on their part, to rebut the evidence of various disinterested witnesses, to wit: Radcliff, Carroll, Wade, Fletcher and Dyer, that they had abandoned; and even further, to contradict the express terms of their location, as evidenced by their notice.

2. The court erred in giving the instruction asked by the plaintiff.

BARBER, for respondent.

1. The first point made by appellant is, that the court erred in permitting the vendors of plaintiffs, under a quitclaim deed, to testify as witnesses in their behalf. No authority is cited for this novel legal proposition, in direct conflict with the simplest rules of evidence.

"A former vendee, who has sold without warranty, is competent to prove a title." (*Busby v. Greenslade*, 1 Strange, 445.)

"A vendor with warranty against his own acts and those claiming under him, is a competent witness for his grantee in ejectment against one who does not claim under those to whom the warranty extends." (*Connelly v. Chiles*, 2 A. K. Marsh. 243.)

As to the charge asked by plaintiffs and given by the court

we confidently leave it to the decision of this court, as containing a correct exposition of the law applicable to such cases.

The charge asked for by plaintiffs' counsel claimed this lead only in case the jury should believe, at the time of locating the same, "that the true direction of the lead, so struck by Soulsby at the time of posting their notice, was not known and could not readily be traced."

The jury by their verdict have shown their belief in the fact that at that time the direction of the lead was not known, and could not readily be traced, and they certainly were the proper judges of that fact.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., and FIELD, J., concurring.

This was a suit for the recovery of a mining claim. Various errors have been assigned by the appellant, none of which, it seems to us, are well taken.

The vendors, who had sold to plaintiff by quitclaim deed, were called by plaintiff and objected to as incompetent, on the ground of interest; but it is well settled on principle and authority that the objection is not good.

It is also objected that several leading questions were permitted to be asked of a witness; but if this were a reviewable error, if the record warranted the point, it is not, in this instance, well founded in fact.

The only question deserving of consideration arises from an instruction of the court, as follows:

"That if the jury believe from the evidence, that just after the discovery of the lead by Soulsby and on his information, the Putoff claim was located, and his notice posted to the south of and immediately adjoining the Soulsby claim, and that the then direction of the lead so struck by Soulsby, at the time of posting such notice was not known and could not readily be traced; and if the jury believe further, that Putoff intended by such notice to take up a claim on the lead which Soulsby had struck, and located his claim to the southward of the Soulsby claim, the part of the notice, supposing the vein to run in a southwesterly direction, instead of nearly due south, would make no difference, and he would be entitled, on otherwise com-

plying with the quartz-mining law, to hold the number of feet allowed by law on that lead, whether such lead lay in a south-westerly direction from the spot where Soulsby first struck it, and by whatever name it might be called."

It seems by the mining laws and regulations of the neighborhood, the locator of a quartz lead has a right to a lead taken up by him for a distance of nine hundred feet, upon complying with certain rules, one of which is, that he shall post up notice near the premises, stating his claim. A portion of this claim was undeveloped and underground. The vein ran as subsequently ascertained, in a different direction from that given in the notice. The defendant claims by a location subsequent to plaintiff's, on the undeveloped portion of the vein, which was out of the direction indicated in the notice. We think that this misdescription in the notice does not vitiate the plaintiff's claim. The main thing was *the vein*; this it was that was intended to be taken up, and the exact direction could not, of course, be ascertained or accurately described until the vein was followed up or explored.

All the questions as to the prior location, abandonment, credibility of witnesses, etc., were fairly submitted to the jury and we can not undertake, in a case which seems to be peculiarly appropriate for their action, to say that they erred in passing upon contested facts.

The judgment is affirmed.

FERRON V. STURGEON.

(10 Iowa, 586. Supreme Court, 1859.)

Variance between agreement and the deed tendered thereon.
—The grantor of real estate in a contract of sale of a certain tract of land reserved "twenty feet of stone-coal running east and west through the same." In the deed tendered to the purchaser this reservation was described as "a strip or belt of stone-coal twenty feet wide and running through or across said tract in an easterly or northeasterly direction, conforming to the course of the coal vein": *Held*, that the description in the deed was

essentially different and more extensive than that set out in the contract of sale.—STOCKTON, J.

¹TILEY V. MOYERS.

(43 Pennsylvania State, 404. Supreme Court, 1862.)

Eviction of lessee—Rent—Recoupment. An eviction such as will suspend rent is an actual expulsion of the lessee out of all or some part of the demised premises; the rent already accrued and overdue is not forfeited by the eviction, but in an action for such rent, the tenant may defalk the damages caused by it.

Lease of coal-bank equivalent to sale of coal. A demise of a coal-bank for a term of years, in which the rent reserved is a fixed price per bushel for the coal to be taken from the bank, amounts to a sale of so many bushels as the tenant shall take during the term, for the price fixed in the lease.

²**Latent ambiguity solved by jury.** Where the lease described what was let by the lessors as their “coal-bank and the appurtenances thereunto belonging,” and did not otherwise describe the premises leased, nor the boundaries, in an action for the rent reserved, in which eviction is set up as a defense, it is for the jury and not for the court to say what was the extent of the demise, it being rather a latent ambiguity to be solved, than an instrument of writing to be construed.

Lease—Implied covenant for quiet possession—Rent not suspended by eviction. Where it was a disputed point as to how much was leased, the demise being of a “coal-bank and the appurtenances thereunto belonging,” and the lessor had had undisputed possession of one coal opening, if one only had been leased, the entry of the lessors, or others under them, upon other parts of the tract, would not be an eviction, and the lessee would be bound to pay for the coal taken by him from that opening. But if the grant was co-extensive with the coal veins of the whole tract, and the lessors, without interrupting the lessees’ actual mining operations, entered and took coal from the tract demised, they were guilty of a breach of the implied covenant for quiet possession, and the lessee could set off the damages resulting therefrom against the claim for rent accrued under the lease. Such an eviction, however, would not suspend the rent, where it has not been reserved as an equivalent for the possession of the tract, but for the coal actually taken therefrom.

Recoupment by lessees for ejectment and estrepement. Where ejectment had been brought by the lessors to try the question of forfeiture, under a provision of the lease which forbade the tenant to let the mine stand idle for a year, in which they failed, damages therefor could not

¹See *Moyers v. Tiley*, 32 Pa. St. 267; *Post* LEASE.

²Compare *Kamphouse v. Gaffner*, 2 M. R. 258.

be allowed by the jury in an action for the rent, but for the estrepement brought by them, which interrupted mining operations, damages were properly allowed and assessed by the jury under the charge of the court.

Cross-examination: Where, upon the trial, the commissioner appointed by agreement to report the quantity of coal mined by the defendant, had produced and identified his report, having been called for that purpose only, he could have been cross-examined by the defendant as to its identity, but not as to the basis on which it was made; to obtain evidence of the contents of the paper, the defendant should have called the witness in chief.

Error to the Common Pleas of Cambria County.

These were actions of covenant, five in number, brought in the court below to March, June, September and December terms, by Michael Moyers and Elizabeth Moyers for use, etc., against William Tiley, Sr.

The articles of agreement on which suit was brought, contained among others the following covenant:

“The said Moyers, of the first part, doth agree to grant, lease and demise unto the said Tiley their coal-bank and the appurtenances thereunto belonging, together with the privilege of timber for use of coal-bank for and during the term and space of ten years from the 1st day of March, 1852, and to continue until fully complete and ended. In consideration of which, the said William Tiley, Sr., doth bind himself well and truly to put the said coal-bank in good working order for the rent of the first year, and to pay for the second and third year one quarter of a cent per bushel for each and every bushel of coal taken from the said bank, and for the remaining seven years one half cent per bushel for each and every bushel of coal; payment to be made quarterly.”

Some time after the date of the agreement, Tiley commenced taking coal from the bank leased, and except when he was interrupted in his operations by certain writs of estrepement issued in ejectments brought by the lessors, continued to do so, and these actions were brought to recover for the coal taken by the defendant under the agreement, and at the stipulated rate or price during the periods covered by the declarations filed in the several suits.

The first action claimed for the amount of coal taken between the 1st of March, 1853 (the date at which the defend-

ant was to begin to count), until the 1st of December, 1858, five years and nine months.

The second action claimed for the coal taken from the 1st December, 1858, until 1st March, 1859, three months.

The third action claimed for the coal taken from the 1st March, 1859, until 1st June, 1859, three months.

The fourth action claimed for the coal taken from the 1st June, 1859, until the 1st September, 1859.

And the fifth section claimed for the coal mined and taken from the 1st September, 1859, until the 1st December, 1859.

By agreement of the parties the issues in all cases were tried together, and the evidence applicable to each and all of them heard together; and it was also agreed that any amount ascertained to be due to the plaintiffs, should be found in the last action, and the costs of the other actions should follow the judgment in that one.

To sustain the issues on their part the plaintiffs gave in evidence the agreement, and then showed by several witnesses that Tiley commenced mining upon the premises embraced in the lease shortly after its date, and continued mining there since. They followed this with the evidence from the books of the defendant (ascertained and reported by John S. Rhey, Esq., a commissioner appointed by agreement for that purpose), that he shipped and sold between the 1st of March, 1853, and the 1st of September, 1859 (the period covered by the claims in all the actions), coal, 76,940 bushels; coke, 42,271 bushels.

The plaintiffs following this with the testimony of James Farron and John A. Lemon, that the average yield of coal in coke is "bushel for bushel," claimed for this amount at the rate stipulated in the agreement, with interest.

The defense to the claim was twofold: first, that the defendant was evicted from the premises leased, during the term which, it is alleged, suspended the rent and precluded any recovery after that time; and, secondly, that if this were not so, it was shown in point of fact that a large portion of the coal claimed for was not taken from the Moyers land, and further, that the defendant, if his legal defense should be overruled, was, in any event, entitled to a deduction as compensation in damages

for omissions and failures of the plaintiffs to perform their covenant.

The eviction was alleged to have occurred in two ways: first, by Michael Moyers himself, and afterward by John A. Lemon under his authority, entering upon the Moyers land to mine coal, and mining coal upon it during the term; and secondly, by bringing ejectments and issuing estrepements, and thus interfering with him injuriously in the enjoyment of his rights under the lease. It was claimed that these acts amounted to evictions which suspended the rent.

As to the entry of Moyers and John A. Lemon to mine, there was a disputed question of fact, whether it was upon that part of the Moyers land contemplated by the parties to the lease and embraced in it.

On the trial the plaintiffs called John S. Rhey, who had been appointed by agreement of parties to ascertain the amount of coal shipped by William Tiley from March 12, 1853, to December, 1858, and offered his report in evidence.

This was objected to by defendant because it did not show from what bank or banks the coal was taken; and he asked permission to cross-examine the witness as to how the report was made up. The court below admitted the report in evidence and refused to allow the cross-examination as to the manner of making it up.

The court below (TAYLOR, P. J.), after stating the material facts of the case, and the points on which the defense rested, charged the jury as follows:

“As to the entry of Moyers and John A. Lemon to mine, there is a disputed question of fact whether it was upon that part of the Moyers land contemplated by the parties to the lease, and embraced in it. In view, however, of the peculiar terms of this agreement, and the evidence of what was done under it, we are of opinion that this entry, assuming it to have been on that part of the Moyers land in contemplation of the parties at the execution of the agreement, did not amount to an eviction such as would take away the right of the plaintiffs to claim for coal actually taken by the defendant, most of it subsequently, at a stipulated rate per bushel. It is our opinion, as the result of the hasty examination we have been compelled to give this point, that the reason of the rule

that the entry of the landlord upon any part of the demised premises during the term suspends the rent entirely, and precludes the right of recovery altogether, does not here apply; and that, assuming the question of fact to be with the defendant, this case is to be viewed and treated as falling in with the exceptions to the rule."

In commenting upon the legal effects of the writs of estrepement issued by the lessors, the learned judge said, "But for all the coal actually mined and taken by the defendant before the estrepements issued, or after they had been dissolved or while and after Moyers and Lemon were operating on another part of the Moyers land, the plaintiffs have a right to claim, subject to a deduction in favor of the defendant, as compensation for any loss or damage sustained by him in consequence of any violations or non-performance of the covenants of the plaintiffs contained in the lease. We so instruct you, as the result of the best examination we have been able to give to the question; and in thus instructing you, we feel that we are submitting the case upon its substantial merits; for why should not Mr. Tiley pay for the coal which he actually got, if, on the other hand he is fully and fairly compensated for any loss or injury which the evidence shows him to have sustained by reason of the improper interference of the plaintiffs with his operations, or their failure to comply with their covenants?"

Under the head of the inquiry as to what deduction the defendant would be entitled to from the amount claimed by the plaintiffs upon their evidence, after instructing them to deduct the \$780, recovered by Jeremiah McGonigle for coal taken out of what was called the "eleven acres," the court added, "You will deduct further from that amount such sum as will fully and fairly compensate the defendant for the interruptions interposed by the estrepements issued by the plaintiffs. We believe it is not alleged that the entry and operations of Michael Moyers and John A. Lemon resulted in any actual damage. The estrepements issued in the ejectments, however, did; to what extent and what the injury was to the defendant, and what sum will compensate him therefor, you will determine from all the evidence." "The defendant has also given evidence to show the expenses, etc., to

which he was subjected in defending the action of ejectment brought against him by the plaintiffs; such as counsel fees, the cost of printing, paper books, etc. This, it is our opinion, he is not entitled to claim here. The ejectment, as it appears, was brought to determine a disputed question as to the right of the parties under the agreement. The plaintiffs, we think, had a right to go before the proper tribunal, and resort to their action for that purpose, without subjecting themselves to liability for anything beyond the legal costs of their action if unsuccessful; being also responsible for any actual damage or interruption occasioned thereby, as we have already explicitly instructed you."

In answer to the third point put to the court by the defendant's counsel, which point was as follows, viz.: "that the lease upon which the actions have been brought, demising the plaintiffs' 'coal-bank,' was the grant for the term therein stated of the vein of coal constituting the bank, and not a mere 'privilege' of taking coal out of it, and if the jury believe the plaintiffs entered into the possession of any part of the coal vein adversely and held it against the consent of the defendant, it would amount to an eviction, and will suspend the entire rent during the time of such adverse holding," the court responded in the negative.

These instructions (under which there was a verdict and judgment for plaintiffs), together with the refusal of the court below to permit the cross-examination of John S. Rhey as to the basis of his report, were assigned here for error on writ of error by defendant below.

JOHN G. MILES and JOHN SCOTT, for plaintiff in error.

THOMAS WHITE, PHILIP S. NOON and A. KOPELIN, for defendants in error.

WOODWARD, J.

Eviction, such as will suspend rent, is more than a mere trespass by the lessor, or a breach, in any other form, of the implied covenant for quiet enjoyment; it is an actual expulsion of the lessee out of all or some part of the demised premises. Rent is an equivalent or consideration of a demise, and it is impossible that the rent should last longer

than the demise. It is the plain dictate of common sense that a lessor shall not exact his rent while he holds the tenant out of possession. But this is suspension, not forfeiture. His right to rent is restored by restoring the tenant to the possession. And rent already accrued and overdue, is not forfeited by eviction. If sued for such rent, the tenant may defalk the damages which the eviction caused, but the landlord's title to rent and his consequent right to sue therefor, are unimpaired by the eviction. He can not, however, apportion rent. If a landlord might evict his tenant from part of the demised premises, and hold him for an apportioned rent of the residue, this would be substitution of his arbitrary will for the mutual agreement which a lease is. The law apportions rent in certain cases, but it does not allow a lessor to apportion it by means of a partial eviction.

How do these principles apply to the case in hand? The thing demised here was a coal-bank, and the rent reserved was a fixed price per bushel for the "coal taken from said bank." The term was ten years and the lease affords satisfactory evidence that the parties did not anticipate an exhaustion of the coals in that term. It may be regarded, therefore, as a sale at the price fixed in the lease, of so many bushels as Tiley should take during the term. He was bound to take no given quantity, though he was to forfeit the lease if he let the bank stand idle for a year when it would yield coal. For the first year's rent he was to put the bank in good working order; for the second and third years he was to pay one quarter of a cent per bushel for each and every bushel taken from the said bank; and for the remaining seven years, one half cent per bushel.

Several actions of covenant were brought by the lessors in 1859, which are now by agreement all consolidated into one for the recovery of the accrued rent under this lease. They claim for so many bushels of coal, actually taken at the contract rates. The defendant alleged an eviction from part of the demised premises. And he set up this defense, not as a ground for defalking the damages merely, but as a bar to the action. His third point was, that the "lease was a grant for the term stated of the vein of coal constituting the bank, and not a mere privilege of taking coal out of it; and

if the jury believe the plaintiffs entered into the possession of any part of the coal vein adversely and held it against the consent of the defendant, it would amount to an eviction, and will suspend the entire rent during the term of such adverse holding." He alleged no expulsion of himself, but only an adverse entry of the plaintiffs. The "term of such adverse holding" was the time he was taking coals from the Russel bank, which was one of the coal openings on the tract of land. The doctrine of the point is, therefore, that the lessors forfeited their right to recover the contract price of the coals taken by the defendant from the Russel bank, because of their entry into and mining other openings on the tract. He alleges no attempt to mine where the plaintiffs mined, and no attempt by them to mine at the Russel bank; but he will not pay for the coals he took because they took coals.

Whether the entry of the plaintiffs was even a partial eviction of the defendant depends on the extent of the demise and on this point the lease is disgracefully ambiguous. The whole tract consisted of two hundred acres on which coal had been mined at several openings. One of these was known as the Russel bank; the others called by other names, were on a part of the tract that lay on the other side of a ravine which crossed the tract, and, in the judgment of some witnesses, severed the coal-measures. The lease described the thing granted by the lessors, no otherwise than as their "coal-bank, and the appurtenances thereunto belonging." There was evidence tending to show that this was only a lease of the Russel opening, which was what the plaintiffs alleged, and other evidence, that the whole tract was intended to pass by the lease, which was what the defendant alleged. Thus, the fundamental fact in the case was in dispute from first to last. The lease ought to have been so drawn as to exclude this topic of dissension. We think it was for the jury, and not for the court, to say what was the extent of the demise, because it was rather a latent ambiguity that was to be solved than an instrument of writing to be construed. The meaning of the words used is plain enough, but the extent and scope of their operation are where the ambiguity lurks. Words enough were not put into the instrument to define the boundaries of the

grant, and, therefore, it was for the jury to define them from evidence *dehors* the instrument.

It is not easy to say from the record whether the court submitted this question to the jury, nor how they decided it if it was submitted. But if the jury believe that the defendant leased only the Russel opening, it is manifest they found no eviction, for there was no evidence from which they could find it. Regarding the lease as a grant of that particular coal-bank, and the rights of way and of timber as incidental to such a grant, Tiley has nothing to complain of, for he has enjoyed the grant and its incidents, if not free from annoyance, without expulsion and without hindrance to his mining. Why should he not pay for the coals he took? The entry of the lessors or others under them, upon other parts of the tract, was an irrelevant circumstance if only the Russel opening were leased. It was not eviction, either partial or total nor to justify it is it necessary to construe the grant an incorporeal hereditament. It was an entry which the owners had as good a right to make as if they had never leased the Russel bank. No matter whether the interest leased were corporeal or incorporeal, if it consisted of a right to take coals from the Russel opening, the simple and all sufficient reason why Tiley should pay for what he took, is that he agreed to do so, and he was never evicted from that possession.

But now, on the other hand, suppose the jury meant to find, or under proper instructions would have found, that the grant was co-extensive with the coal veins of the whole tract, and suppose that this was what the defendant insists on calling it, a corporeal hereditament, it was a sale, then, of so much coal as Tiley should take from any part of the tract in the next ten years. Now, although an exhaustion of the coal veins was not anticipated, as is apparent from the provision of the lease which bound Tiley to leave the bank in good working order, "so as not to interfere with the taking out of coal on the expiration of the lease," yet it was possible that he might, during his term, take all the coal, and by the express terms of the lease no other person was to have the privilege of taking coal during his term without his consent.

In these circumstances the lessors, without interrupting Tiley's actual mining operations, entered and took coals from

the tract. What was the legal effect of that fact on this action of covenant?

The plaintiffs were guilty of a breach of covenant in this view of the case, and Tiley was entitled to set off the damages resulting therefrom against their present cause of action. That much is clear. But was it an eviction such as would suspend rent? Clearly not, because the rent was not the consideration of the possession, or of the timber leave, or of the building privileges, or of all these together; but was the equivalent, the *redditus*, for the bushels of coal actually taken. Had Tiley been prevented from taking coals, that would have been an eviction, and would have suspended the rent of course. What he was to pay was to be measured by what he should take in the bushel. No coals, no rent, says the lease in substance. The possession of the land and the privileges mentioned were incidental to the coal right, but no rent was fixed for them. Nor is this action brought for the use and occupation of them. It is for the price of so many bushels of coal actually taken; and to such an action the facts alleged in defense amount, not to a bar, but to an equitable right of set-off for the damages sustained. And the court's answer to the third point was to this effect.

Whichever way, therefore, the lease be regarded, whether as a demise of the Russel bank only, or of all the banks on the tract of land, and whether the interest granted be treated as corporeal or incorporeal, we see nothing in the instructions of the learned judge that demands reversal.

And we approve of his ruling in respect to the writs of ejectment and estrepement. For the latter, which interrupted mining operations, he allowed the jury to assess damages, but not for the ejectment which was brought to try the question of forfeiture under that provision of the lease which forbade the tenant to let the mine stand idle for a year. We agree with the judge that the plaintiffs had a right to try this question at law, and for their failure of success were punishable with costs, but not with damages to be set off in this suit.

There is nothing in the bill of exception to evidence. The plaintiffs called Rhey only to identify his report. This entitled the defendant to cross-examine him as to the identity of the paper, but not as to its contents. If his testimony

touching the contents was needed on the part of the defendant, he should have called the witness in chief, subject to cross-examination on the other side.

The judgment is affirmed.

READ, J., dissents from so much of this opinion as asserts if all the coal in the tract were leased, such an entry as was made did not amount to an eviction, and suspend the rent whether payable in money or its equivalent.

REED V. SPICER ET AL.

(27 California, 57. Supreme Court, 1864.)

False description rejected as surplusage. When a deed conveys a right of way by two independent descriptions and one of them is false in fact, such false description must be rejected as surplusage.

¹ **Right of way in ditch the same as the ditch itself.** A deed which conveys all the right of way in, to and for a mining ditch called the "M. B. W. Co." is a conveyance of the ditch; for there can be no distinction between the right of way in the ditch and the ditch itself.

² **Sale by tenants in common to tenants in common.** H. and P. were tenants in common of a mining ditch; H. conveyed all his interest to defendant, and P. all his interest to plaintiff by a deed of later date: *Held*, that neither of the grantors could be considered as having conveyed against the will of the other, and that their grantees, the plaintiff and defendant, became tenants in common.

Statute of Limitations. Where plaintiff claimed title by Mexican grant confirmed by act of Congress and patent founded thereon: *Held*, that evidence of adverse possession in defendants prior to the date of plaintiff's patent was properly excluded, because the Statute of Limitations only began to run at that date.

Appeal from the District Court of Stanislaus County, Thirteenth Judicial District.

COFFROTH & SPAULDING, for appellants.

H. P. BARBER, for respondent.

By the Court, SHAFTER, J.

This is an action of ejectment brought to recover the pos-

¹ *Kidd v. Laird*, 15 Cal. 163; *Post Ditch*.

² *Hartford Co. v. Miller*, 3 M. R. 353.

session of certain premises described as "The Mountain Brow Water Company's Ditch, consisting of dams, ditches, flumes and reservoirs used for mining and irrigating purposes, lying and being situate in the counties of Calaveras and Stanislaus." Trial by jury; verdict and judgment for plaintiff. The appeal is from the judgment and from the order overruling defendants' motion for a new trial.

It appears from the record that the ditch in question crosses certain two leagues of land which, on the 25th of January, 1860, were owned by Salsbury & Haley and James Phelan as tenants in common, and certain other lands belonging to one Packard, adjoining the lands first mentioned, on the west. On the aforesaid date, Packard conveyed to the plaintiff that part of the ditch which crossed his own land and ten feet additional on each side of it; and on the 26th of June, 1862, Phelan executed to the plaintiff a deed purporting to convey that section of the ditch which crossed the two leagues owned by the grantor in common with Haley, with a like selvedge of ten feet on either side. The plaintiff having proven these facts, and shown the defendants in possession, rested his case.

The defendants, in support of the issue on their part, offered in evidence a deed executed by said Haley to Thomas Spicer, one of the defendants, January 25, 1860. The evidence was objected to; first, on the ground that the deed did not convey, nor purport to convey, any interest in the land in question, but merely an interest or easement in certain lands belonging to Spicer, the grantee; and second, on the ground that Haley, being merely a tenant in common of the land, could not grant an easement therein. The objections were sustained, and the defendants excepted. The defendants then offered to prove by Spicer that the ditch was constructed in 1856, and that it was constructed by the defendants and those from whom they derived title, and that they had ever since held the ditch adversely to the plaintiff and his grantors. It being already in proof as a part of the plaintiff's case, that he held under a Mexican grant confirmed under the act of Congress, and that the patent founded thereon did not issue until 1863, the court excluded the evidence, on objection of the plaintiff, and the defendants excepted. These rulings of the court we are now called upon to review.

1. As to the exclusion of the deed from Haley to defendant Spicer.

By the deed, Haley, the party of the first part, "for and in consideration of one dollar to him in hand paid by the party of the second part (Spicer), remised, released and quitclaimed unto the said party of the second part, and to his heirs and assigns forever, all the right of way in and upon the land owned by the said party of the second part, in, to and for the ditch called 'Mountain Brow Water Company,' together with the privilege of building a dam across Little John's Creek, for the purpose of a reservoir for said ditch, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above-described premises, and every part or parcel thereof, with the appurtenances. To have and to hold," etc.

The interest intended to be conveyed is, literally, a "right of way." There are two independent descriptions of the way: first, by name—"a way to, in and for the ditch called Mountain Brow Water Company;" second, by indicating the land which the way crosses, viz., "land owned by Spicer." It is clearly shown by the record, and counsel on both sides admit, the second description to be false. If false, the description should be rejected: *Broom's Max.* 490. In the case of a lease of a portion of a park, described as being in the occupation of S., and lying within certain specified abuttals, with all the houses, etc., belonging thereto, "which are now in the occupation of S.," it was held that a house within the abuttals, but not in the occupation of S., would pass: *Smith v. Galloway*, 5 B. & Ad. 43; *Beaumont v. Field*, 1 B. & Ald. 247. The ditch is spoken of in the deed as a ditch then existing. Its termini and branches are set forth in the complaint, and the disseizin alleged comprehends the whole of the ditch, branches included. Stakes, the surveyor, called by the plaintiff, testified that "the property described in the complaint was located in part on the two leagues owned by Phelan and Haley, and in part upon the three and a half leagues to the west, owned by Packard; and this was the only testimony

upon the subject. Nor was there any evidence in the case showing that there was any ditch in the counties of Calaveras and Stanislaus known as the "Mountain Brow Ditch Company," other than the one crossing the lands above mentioned. The deed, then, does not present the case of two descriptive phrases, one of which by restraining or narrowing the larger scope of the other, makes it more specific—both amounting to but one description in legal effect; but instead thereof, the deed, when read in the light of the *res gestæ*, presents the case of two descriptions, independent and detached, one of which goes upon a matter of fact which the proof of the plaintiff shows had no existence at the time when the deed was executed.

As to the second objection to the admissibility of the deed, it was not, in our judgment, well taken. Substantially the conveyance was of the ditch, for there can be no distinction taken between a "right of way in a ditch" or "for" an existing ditch, and the ditch itself. The argument of the respondent proves too much; for if a mining ditch is to be regarded as a mere easement, or incorporeal hereditament, it would follow that this action could not be maintained. But passing this, we do not consider it necessary to inquire as to the effect of a deed executed by one tenant in common of all his interest in a given part of the common property, or of some estate therein of a quality inferior to his own. That question does not arise on this record. Assuming the fact which the rejected deed would have established had it been admitted, Haley, one of the tenants in common of the ditch, conveyed all his interest in it to defendant Spicer in 1860, and Phelan conveyed all his interest in it to the plaintiff in 1862. The parties to this suit, then, are tenants in common of that portion of the ditch crossing the two leagues, if the validity of both deeds be assumed; but if the deed under which the defendants claim from one of the tenants in common be held as invalid for the reason that the co-tenant was not a party to it, then the deed under which the plaintiff claims must be void by parity of reasoning, and the plaintiff is out of court. But the deed of Haley to Spicer is good as between the parties to it, and so as to the deed from Phelan to the plaintiff. Phelan might have avoided the deed of his

co-tenant to Spicer (1 Hill. R. P. 585) and so could the plaintiff if he had succeeded fully to Phelan's rights. But he has not. Phelan and Haley are still tenants in common of the two leagues, less the ditch. Haley has conveyed his interest in the ditch to Spicer, and Phelan has conveyed his interest in it to the plaintiff. The respective grantors have co-operated in withdrawing the ditch from the operation of the common title, and as between the two neither can now be considered as having conveyed against the will of the other. The conveyance by Phelan was all that was wanting to make Spicer's title perfect, and the prior conveyance by Haley to Spicer was the very fact which put it in the power of Phelan to make a perfect title to the plaintiff. As neither of the grantors can now question the action of the other, their respective grantees can not do it. As between themselves, they are what the several but co-operative deeds of Phelan and Haley have made them, viz., tenants in common of the ditch and its branches: *Stark v. Barrett*, 15 Cal. 368; 1 Wash. on R. P. 417. Therefore the deed of Haley to Spicer should have been admitted.

The evidence of the defendant offered in support of the plea of the Statute of Limitations was properly excluded, for the statute began to run only from the issuing of the patent, January 31, 1883: *Richardson v. Williamson*, 24 Cal. 289.

Judgment reversed and cause remanded.

STATE OF NEVADA V. REAL DEL MONTE GOLD AND SILVER MINING CO.

(1 Nevada, 523. Supreme Court, 1865.)

¹**Sufficient description for assessment purposes.** Where the assessment called for "one mine of four thousand and four hundred feet on Last Chance Hill," it is a sufficient description of the possessory right for the purposes of taxation, when coupled with knowledge that it is almost a universal custom in Nevada, to take up mining claims, describing them as so many feet of a lode, but giving no lateral boundary to the claim; and such description will not include the fee simple title.

¹*St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, *Post* PATENT; *Golden Fleece Co. v. Cable Co.*, 1 M. R. 136.

Variance—Consolidated claims one mine. Where the complaint filed to enforce such assessment enlarged the description so that it read, "those certain mining claims situate on Last Chance Hill in said county, known as the Real del Monte, Aurora, Last Chance, * * containing in all 4,400 feet, more or less, and being the same property described in the assessment," there is no variance between the two descriptions. Where many claims are consolidated in the hands of one company there is no impropriety in calling it one mining claim.

Appeal from the District Court of Esmeralda County, Ninth Judicial District.

The facts appear in the opinion.

QUINT & HARDY, for appellant.

WILLIAM H. BORING, for respondent.

By the Court, BEATTY, J.

This was an action brought against the defendant, a mining corporation, to recover the sum of five hundred dollars, claimed to be due for taxes on a *mine*. The court below gave judgment for the plaintiff, and the defendant appeals. Two points are raised by the appellant. First. That the language used by the assessor in assessing the property, indicates that the ultimate right to the property described was assessed, and not the mere possessory claim of the appellant. We think differently. The language used by the assessor, in describing the property assessed, is as follows: "One mine of four thousand four hundred feet, situated on Last Chance Hill." This language, in many parts of the world where the English language is spoken, would appear very indefinite, and convey no fixed idea to the generality of English scholars. The question might be asked: Does it mean a body of mineral containing four thousand four hundred cubic feet—a surface of four thousand four hundred square feet—extending to the center of the earth, or a surface of four thousand four hundred feet square extending to the center of the earth? Or it might be supposed to mean a half dozen other things. Without a knowledge of the mining laws and customs of this and some of the neighboring States, the description would be perfectly unintelligible. But when we know it is a common and almost universal cus-

tom for prospectors in this State to take up claims for mining purposes on the public domain, describing them as so many feet of a certain lode, lead, ledge, or mineral vein, with all its dips, spurs and angles, but giving no lateral boundaries to the claim, and on the other hand, that wherever grants of the public domain are made by the government, the term land is always used in the grant, and it is described by metes and bounds, we have not the least difficulty in understanding that the language used by the assessor has reference, not to the ultimate right of the appellant to the soil in which the mine is situated, but to the possessory claim, which, in miner's parlance, is called "a mine," "mining right," "mining claim," "mining ground," etc. The only question for determination here is, did the assessor, in fixing the value of this mine, fix it at what, in his opinion, was the value of the full and complete title to the land, or only the value of the possessory title? If the court are satisfied, from the language used, that the latter standard was the one fixed in the mind of the assessor when he made the assessment, however awkward his expression, the assessment must be supposed. If, on the contrary, the assessor fixed the valuation on the fee simple title of the land, it could not stand, because the fee of the land would be worth far more than the mere possessory right. We are satisfied, for the reasons stated in this opinion and those stated by this court in the case of *Hale & Norcross G. & S. M. Co. v. Storey County*,¹ that the assessor only meant to assess the possessory right of appellant in the mine.

The next alleged error is, that the court erred in permitting evidence to be introduced varying and adding to the language used in the assessment-roll. The assessment-roll described the property as a mine "of four thousand four hundred feet situated on Last Chance Hill."

The complaint describes the property as follows: "Also, those certain mining claims situate on Last Chance Hill in said county, and known as the "Real del Monte," "Aurora," "Last Chance," "Yellow Jacket," "Pond," "Sunbeam," "Western Summit," "Crockett," "Chihuahua," and "Midnight," containing in all forty-four hundred feet, more or less, and being the same property as described in the assessment-roll of said county for the year 1864. There is no contradic-

¹ 1 Nev. 104; *Post Tax*.

tion between these descriptions, there may be many claims in one mine, and where many claims are united or consolidated in the hands of one company there is no impropriety in calling it one mine, or one mining claim. The description in the assessment-roll was general. The law of 1864-5, p. 163, expressly authorizes the district attorney to give, when he brings suit for delinquent taxes, a more particular description of the property on which the taxes remain unpaid than that used in the assessment-roll. This the district attorney in this case has done. He alleges, however, that his description embraces the same property as that described in the assessment. We must presume in favor of the judgment in the court below that he established that fact, until it is shown that the description in the complaint embraced ground not included in the assessment. This is not shown.

The judgment is affirmed.

BRANDOW V. THE POCOTILLO SILVER MINING Co.

(6 Nevada, 169. Supreme Court, 1870.)

The words "Pocotillo Mine," in a mortgage, construed. Where a dispute arose between Brandow and the Pocotillo Silver Mining Company, as to the ownership of eight hundred feet of mining ground, and, on an amicable settlement, a contract was entered into between them in which, after reciting the controversy as to such mining ground "known as the Pocotillo Mine," Brandow agreed to convey to said company all his right, title and interest in "said claim or mine," and the company agreed, among other things, to pay Brandow \$15,000, and that the contract should "operate as a lien by way of mortgage upon said mine" to secure the same. *Held*, that the mortgage was restricted to the mining ground in controversy, and could not include the Pocotillo Mine in fact, which embraces much more ground.

Description limited to the mine so known at time of contract. The words "Pocotillo Mine" being used in the contract to designate certain mining property therein specifically described, could not be construed to intend any additional part of the larger tract afterward known as the Pocotillo Mine.

Appeal from the District Court of White Pine County
Eighth Judicial District.

GARBER & THORNTON, for The Pocotillo Silver Mining Company, the appellant.

ALDRICH & WREN, for respondent.

By the Court, WHITMAN, J.

This action was for the foreclosure of a mortgage upon certain mining property; and the sole question presented for review is as to the extent of ground which should be covered by the decree. The appellant's grantors, upon the twenty-sixth of May, 1868, made a location of mining ground the notice whereof appears in the books of the mining recorder, thus:

"We, the undersigned, claim eight hundred feet (800) on this quartz ledge, together with all dips, spurs and angles, running in a southerly direction from this monument; two hundred feet for discovery and two hundred feet each by location. We also claim one hundred feet on each side of the ledge for mining purposes. This shall be known as the Pocotillo ledge and Belmont company."

On the twenty-eighth of December, of the same year, respondent's grantors made their location, which appears on the records, thus:

"This is to certify that we, the undersigned, do locate and claim the first northern extension of the Pocotillo mine, claiming one thousand feet, with all the privileges of the White Pine district. This claim shall be known as the first northern extension of the Pocotillo mine, district of White Pine, Lander county, State of Nevada."

Subsequently a dispute arose and litigation ensued between the present parties, growing out of the claim of appellant, that there was a mistake in the record of its grantor's notice; and it should have read, running in a northerly direction from the monument, instead of "in a southerly direction," as on the records. This litigation was compromised, and an agreement was executed between the parties, as follows:

"Whereas, the Pocotillo silver mining company, a corporation organized under the laws of the State of California, claims to be owner of certain mining ground situated in the

county of White Pine, State of Nevada, known as the Pocotillo mine; and whereas, Peter Brandow claims to be the owner of the same ground and two hundred feet additional; and whereas, there has been a dispute between the said parties as to the ownership of said ground, each claiming adversely to the other; and whereas, litigation has ensued between the said parties to determine the ownership of said mining claim, which litigation is not yet disposed of. Now, therefore, it is hereby covenanted and agreed by and between the said Pocotillo silver mining company of the one part, and the said Brandow of the other part, as follows: That the said Brandow shall convey to the said Pocotillo silver mining company all his right, title and interest in and to the said claim or mine. That in consideration of such conveyance, the said Pocotillo mining company shall, immediately upon the execution hereof, deliver to the said Brandow five hundred shares of the stock of said company (the whole number of shares being four thousand) properly transferred on the books of the company to him, the said Brandow or his assigns. That the said Pocotillo silver mining company shall deliver to said Brandow the first fifteen thousand dollars, in gold or silver coin, that shall be produced over and above working expenses from said mine, or the ores thereof now extracted, whether the same shall be reduced by said company or the ores sold at the dump for coin. It is further agreed, that upon the execution and delivery hereof, the said Pocotillo silver mining company shall pay to the said Brandow one thousand dollars in gold coin.

“ And for the faithful performance and fulfillment hereof, these presents shall operate as a lien, by way of mortgage, upon said mine and the ores thereof, and may be enforced in law or equity as such, the said Pocotillo silver mining company hereby granting and conveying said mine to said Brandow as a security for the fulfillment hereof.

“ And the said company further covenant and agree, that it will within thirty days commence to extract ores from said mine, and diligently prosecute the workings thereof, and that it will with all reasonable dispatch pay off the said sum of fifteen thousand dollars aforesaid, out of the net proceeds of said mine, as aforesaid.

“And if said sum of fifteen thousand dollars shall not be paid on or before six months from date, the said Brandow shall be at liberty to commence proceedings for the foreclosure hereof, and for enforcing payment of the same against said mine, it being expressly understood that the said Brandow shall have recourse only against said mine in the event payment of said sum of fifteen thousand dollars is not made within the six months aforesaid.”

This was accompanied by a deed from respondent to appellant, the description in which recites the granted property as “the first northern extension of Pocotillo, and being the same mine, located on the twenty-eighth day of December, A. D. 1868, by J. S. Reece, H. W. Dunham, J. T. Quigley, W. J. Quigley and P. Fitzpatrick, and by them recorded on the same day, in the mining records of said White Pine district, in book E, page 229.”

This somewhat voluminous statement of fact and recital of evidence has been made, as it really comprises the whole case, and is of itself so nearly decisive that very little more need be said. Default occurring in the payment specified in the agreement, respondent filed his bill and claimed a foreclosure upon eighteen hundred feet of mining ground, one thousand north and eight hundred south, alleging that such was the Pocotillo mine. The answer denied, and averred that the mine referred to in the agreement was only the one thousand feet north; making, as will be seen, no controversy about the most northern two hundred feet.

It would seem that the position of the answer was so self-evident, that there could be no room for doubt. But respondent was admitted to testify, and swore that the Pocotillo mine “embraces eight hundred feet south of the Belmont monument (that referred to in the notice first recited), and one thousand feet north of the same monument. The defendant is in possession of all the said ground, and has been ever since about the fifteenth day of May, 1869. The Pocotillo company has done work on the mine; a portion of the work was done at the monument, and some work was done both north and south of the monument. The eight hundred feet and the one thousand feet comprise what is known as the Pocotillo mine.”

Upon what theory this testimony was offered, or under what rule of evidence received, is difficult to imagine, and as difficult to perceive what possible bearing it has upon the case. If taken at all its possible weight, it is entirely in the present, and if so understood, of course could not affect the fact or intent of the parties at the date of the agreement. If it is to be construed as referring back to the date of the papers, then it simply proves an absurdity; for if appellant was at that time claiming the eight hundred feet south, it had no controversy with respondent. If it was claiming the eight hundred feet north, as in fact it was, then it had at that time no pretense of right to the southern ground, no business upon it, no authority to work it.

But upon the evidence no real conflict arises. The facts are plain, simple, coherent. The parties were disputing about the northern eight hundred feet; both claimed it; the agreement says that it was known as the Pocotillo mine, and about that ground and no other they litigated, compromised, agreed and conveyed. It is a legal impossibility that any other could have been intended, as there was none other in dispute, none other about which any agreement was necessary, or could have been sensibly framed upon the basis set forth in the instrument quoted. The matter is too clear for argument.

Let the decree of the district court be modified, as claimed by appellant, so as to include the north one thousand feet of what is now known as the Pocotillo mine, and no more.

Decree modified.

PHILLPOTTS V. BLASDEL.

(8 Nevada, 61. Supreme Court, 1872.)

¹ **Separate location on same lode—Conveyance of lode held under different names.** Plaintiff derived title to the premises in controversy from D., to whom defendant had conveyed by deed containing the following description: "All that portion of the claim known as the Ward Beecher, commencing at the south side and east end of a long cut running easterly and westerly, generally known as the Ward Beecher Cut. Also all my right, title and interest in the Montrose, Colfax and Barris & Sproul lodes, lying south of a due east and west line drawn from the

¹ *Lebanon Co. v. Republican Co.*, 6 Colo. 372.

south side and east end of the above mentioned cut," etc. The plaintiff conceded that nothing was conveyed by the deed under the name Ward Beecher, on account of incurable defect in that portion of the description, but that the *Colfax* was the same as the Ward Beecher, and was sufficiently described to convey the premises; the defendant disputed the identity of the veins, but claimed that if the same, the Colfax location was a nullity, and nothing passed by a conveyance under that name. *Held*, that where two interfering claims have been made upon the same vein and are held by the same party, the deed of the one will convey the other to the extent of the ground covered by both locations, without regard to their being located and known by separate names, and if it can be ascertained what lode is intended to be conveyed, it makes no difference that it has been called by a name illegitimately acquired.

¹ Vein—Cross seam—Division of lodes. Where a spar seam is found crossing a deposit (considering the character of such seams in the district where Treasure Hill is situate as a matter of notoriety), it does not constitute a division between lodes, even where it is shown that the rock behind the spar seam contains but little ore.

¹ Naming lode. Placing upon a lode a notice of location headed "Colfax Lode" is to christen it with that name.

Location notice, where placed. In order to hold a ledge, it is not necessary that the notice should be placed on the ore or any part of the vein or lode. It is sufficient if the notice is placed in such reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended.

Order granting new trial, when reversed. It is not enough to authorize the appellate court to reverse an order granting a new trial, that the evidence appears fully to support the verdict. It will only be reversed for the most cogent reasons.

Relocation—Conveyance. There is no law to prevent a party from relocating his own claim by a different name and, though he can not thus acquire any more ground, a conveyance by the latter name will be valid.

Deed—Statute of uses—Party plaintiff in ejectment. A deed in which R. grants, bargains, sells, remises, releases, conveys and quitclaims the premises to P. for the use and benefit of the E. & A. M. Co: *Held*, to be a deed of bargain and sale, and that the legal title remained in P. because no use can be limited on a use, and when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant and therefore void; but though not a use which the statute can execute, yet still it is a trust in equity, which in conscience ought to be performed. *Held, also*, that P. rather than the E. & A. M. Co. was the proper party to bring ejectment for the premises conveyed.

Appeal from the District Court of the Eighth Judicial District, White Pine County.

The facts are stated in the opinion. A verdict having been

¹ *Sterens v. Williams*, 1 M. R. 557.

² *Thompson v. Lee*, 1 M. R. 611.

found in the court below for defendant, and plaintiff's motion for new trial having been granted, defendant appealed from the order.

CLARKE & LYON, for appellant.

I. The court below erred in granting a new trial on the ground of insufficiency of evidence. The question is here (as it was below), is the evidence sufficient in law? If there was some evidence to support the verdict, if there was a substantial conflict, then the new trial should have been denied: 4 Nev. 156, 304, 395. This rule is not changed by the fact that the judge trying the cause set aside the verdict. The intendments, which ordinarily lie in support of the verdict, are not reversed or otherwise disturbed by the adverse decision of the judge.

II. The new trial was granted because it was discovered there was no Colfax lode, and because the Colfax location notice was posted in reasonable proximity to the Ward Beecher lode. We submit, however, that the Ward Beecher claim, which was in fact upon a ledge, was not conveyed by the mere fact that the Colfax claim, which was supposed to be on a separate ledge, but which was in fact upon no ledge, was conveyed. The reasonable proximity of the notice to the ledge can only be considered as evidencing the intention of the locator to take the ledge in question. But the intention to take the Ward Beecher ledge by the Colfax location, is conclusively negatived by the circumstance that it recognizes the Ward Beecher location, and is parallel to it, and by the circumstance that the locators claim the discovery of a ledge.

III. The proofs show that the plaintiff held the ground in suit (if at all) as agent and trustee of the Eberhardt and Aurora Mining Company (Limited) of London, England. The legal title vested in that company, and the action should have been prosecuted in its name. The common law was adopted by the legislature of Nevada in 1861; and the statute of uses (27 Henry VIII), which was enacted before the emigration of the colonists to America, was adopted as a part of the common law: 4 Kent, 299; 1 N. H. 237; 3 N. H. 239; 4 Mass. 136; 6 Mass. 31; 3 Binney, 619; 10 John. 456, 505. Under the operation of the statute of uses we claim that Phillpotts, un-

der the deed, was the trustee of an executed trust; that the legal estate conveyed to him was immediately vested by the statute in the *cestui que trust*, to wit: the Eberhardt and Aurora Company; and that therefore the action should have been brought in the name of that company.

IV. Blasdel's deed to Drake does not put the title out of Blasdel. As to the Ward Beecher, it is admittedly void for uncertainty. But the mention in the deed of the Ward Beecher excludes the idea that the Ward Beecher was intended to be conveyed under the name of Colfax; and if not intended to be conveyed as Colfax and not sufficiently described as Ward Beecher, how could the Ward Beecher lode be conveyed in that deed?

V. The Ward Beecher location is oldest in time, and therefore first in right. It is on the ore channel or lode described in the proofs, and is the only lode shown to exist. As there is but one lode, and that is the Ward Beecher, there can be no Colfax lode, unless the Ward Beecher is known by the name of Colfax, which is not shown nor attempted to be shown. The Ward Beecher lode can not pass by the name Colfax unless it was so known and intended. It was not so known and intended, therefore it did not pass.

VI. There can be but one valid location or perfect legal title to the same mining ground, claim or lode, within the same area. It follows, of necessity and conclusively, that if the Ward Beecher is a valid location, the Montrose, Colfax, and Barris & Sproul, if located on the same lode and within the same area by the same parties, are void. It follows, with equal certainty, that if (as admitted) the Ward Beecher location and title were perfect, no other title could be acquired to the Ward Beecher claim or lode, in virtue of the subsequent location of the Colfax, Montrose, or Barris & Sproul on the Ward Beecher lode as such. And as no legal title could be acquired by a second and void location on the same lode within the same area, *a fortiori* no valid title could be acquired to the Ward Beecher lode, previously located, by the subsequent location of supposititious or imaginary lodes within the same superficial area.

THOMAS WREN and F. W. COLE, for respondent.

I. The weight of evidence need not be so decided and great, to authorize a *nisi prius* judge to set aside a verdict, as is required by an appellate court. Such appears to be the doctrine laid down in all the books; and an appellate court will not interfere with the order of the court below, unless in the trial of the case some legal principle was violated, which would have been fatal had the respondent gained the verdict. See *State v. Yellow Jacket M. Co.*, 5 Nev. 415.

II. Phillpotts is the proper party plaintiff to the action. The legal estate is vested completely in him as trustee, and there is no limitation in time to the estate; in fact, no limitation whatever, except that the trustee holds it for the benefit of the Eberhardt and Aurora Company. There might be, perhaps, a controversy between the trustee and the *cestui que trust* as to the status of each one in this matter; but as far as third parties are concerned plaintiff is the trustee of an express trust and is entitled to sue. The person having the legal title, or one who has had possession and been ousted, is the only person who can sue in ejectment. See 4 Denio, 385; 1 Hill on Trustees, 753; *Tyler v. Houghton*, 25 Cal. 29; *Considerant v. Brisbane*, 22 N. Y. 389; Stats. 1861, 19; Cruise's Digest, Title, 12 C. 4, S. 4; *Binney v. Blumsley*, 5 Ver. 500.

III. If the English statute of uses be in force in this State, which we deny, for our statutes recognize "trusts and powers over and concerning lands," still there was no common law use created by the deed under consideration. The fee was conveyed to Phillpotts and the use to the corporation. A trust is always created when, by the terms of the deed, it can be inferred; or, in the language of the Supreme Court of California, in *Eldridge v. See Yup Co.*, 17 Cal. 44, "A deed of bargain and sale may be upon trust in favor of a third party, if words expressive of that intent be used."

IV. The deed from Blasdel to Drake conveyed the premises. The first description, under the name of the Ward Beecher, was defective; but the second was good, as the premises can be made certain and identified. It is shown that the Ward Beecher, Colfax, and Montrose claims are one and the same, or in other words that they are all in the same body or deposit of ore. Blasdel's deed to Drake therefore did not pass a name or a "supposititious ledge," any more

than a deed to land passes imaginary land or castles in the air: it passed just what it purported to pass—all his “right, title, interest, and estate.” See 9 N. Y. 49; Stats. 1861, 21.

By the Court, GARBER, J.

This is an appeal from an order granting a new trial. The grounds upon which it was granted are thus stated by the district judge: “This is an action brought to recover possession of twenty feet of the Ward Beecher ledge, lying immediately south of a line drawn east and west through a point at the south side and east end of the Ward Beecher cut. The jury gave a verdict for the defendant, and the plaintiff now moves for a new trial, on the sole ground that the evidence is insufficient to justify the verdict.

“The Supreme Court of this State (in 5 Nev. 422) has very clearly laid down the rule that ought to guide a district judge in passing upon a motion for a new trial, based upon this ground. ‘The judge who tried the cause should not hesitate to set aside a verdict, where there is a clear preponderance of evidence against it.’ I shall proceed, therefore, after a preliminary statement of the case, to consider, first: what facts have been established by a clear preponderance of evidence, and, second: whether or not the verdict is consistent with the facts so established. In finding the facts, I shall confine myself as strictly as possible to the statement which has been agreed upon by the attorneys, although I find, after an examination of it, that the statement is very imperfect. Much that I deem important is altogether omitted; much that it contains is unintelligible to one who did not witness the trial; and several matters included might as well have been omitted.

“Having heard all the testimony twice, and two arguments of the case, it is certainly difficult, and perhaps impossible, entirely to escape the influence of impressions already fixed. I shall endeavor, however, to look alone to what the statement contains, and to interpret it solely by its own light. It is agreed, on the first page of the statement, that the plaintiff was in possession of the ground in controversy on the third day of July, 1871; that, on or about that date, the defendant entered thereon, took possession thereof, and commenced mining and extracting ore therefrom, and was so continuing

to do and holding the ground adversely to the plaintiff at the date of the commencement of this action. The contest between the parties was solely as to the right to the possession. Whichever was entitled to the possession at the date of the commencement of this action was entitled to a verdict. It was conceded that the defendant had the title to the ground in September, 1869, acquired by purchase from the original locators. The plaintiff claimed that the defendant, by his deed to Drake of September 25, 1869, had conveyed the ground to Drake, and that by subsequent conveyance from Drake to Roberts, and from Roberts to the plaintiff, the title had vested in him.

“The defendant contended that he had not conveyed the ground to Drake, and, therefore, that the title was still in him. There was no dispute as to any other link in the chain of title, and the case, as submitted to the jury, depended solely upon the question, whether or not Blasdel conveyed the ground in controversy to Drake by the deed of September 25, 1869. If he did the verdict was to be for the plaintiff, if he did not for the defendant. The defendant, it is true, relied upon some special matters in defense under which he claimed to recover, even though it should be held that he had originally conveyed the ground to Drake. But these defenses, were excluded. The offer to prove them was overruled; and, as the matters were not gone into, it can not now be known that the defendant would have made even a *prima facie* case on his offer, or that the plaintiff would not have successfully rebutted any evidence which he might have submitted. The mere offer to prove can not, therefore, affect the merits of this motion. If the questions of fact which were submitted to the jury were erroneously decided, the plaintiff is entitled to a new trial.

“The decision of this motion, then, depends upon the question whether the deed from Blasdel to Drake effected a conveyance of ‘that twenty feet of the Ward Beecher ledge lying immediately south of a line drawn east and west through a point at the south side and east end of the Ward Beecher Cut.’ The material portion of the description contained in the deed in question is as follows: ‘All that portion of the claim known as the Ward Beecher, commencing at the south side and east end of a long cut running easterly and westerly, generally known as the Ward Beecher Cut

Also all my right, title, and interest in the Montrose, *Colfax*, and Barris & Sproul lodes, lying south of a due east and west line drawn from the south side and east end of the above mentioned cut,' etc. The plaintiff concedes that nothing was conveyed by this deed under the name of Ward Beecher, on account of incurable defect in that portion of the description. But, as Blasdel clearly does convey all his right, etc., to the Colfax lode south of the line which is the northern boundary of the ground sued for, the plaintiff claims that Drake acquired title to all of the Ward Beecher ledge south of that line, for the reason that, what Blasdel and Drake called the Colfax lode was and is, in fact, nothing else than the Ward Beecher ledge.

"The position of the plaintiff, stated in general terms, is this: there is a lode or ledge—a connected deposit of silver-bearing ore and concomitant vein matter—extending north and south through Treasure Hill, a distance of four hundred feet and over. It does not crop out on the surface in the shape of solid ore, but at different points the surface presents indications of its subterranean existence in the shape of vein matter cropping out—that is, by the occurrence at the surface of small bunches of ore, mixed with the vein matter of the district, broken lime, and spar. In 1867, before the ground was at all developed, Barris and Sproul posted the Ward Beecher notice on these croppings, near the north end of the lode, claiming by location six hundred feet of that ledge, three hundred feet north and three hundred feet south from the location monument, which stood at the south side and west end of the present Ward Beecher Cut. This notice was recorded and the claim perfected by compliance with the mining laws as to work, etc.

"Afterward, in June, 1868, Barris and Sproul, and Hart and Harps posted the Colfax notice, at a point three hundred and twenty-five feet south of the Ward Beecher monument, on the croppings of the same lode. The ground being still undeveloped, the identity of the lode was not known, although it may have been suspected. The locators, however, claim a thousand feet—Hart and Harps taking six hundred, including the discovery claim, south from the monument, and Barris and Sproul the remaining four hundred

feet, north from the monument. The Colfax monument is a few feet south of the south end of the Ward Beecher claim; but the four hundred feet claimed by Barris & Sproul extends north beyond the ground in controversy. The Colfax notice is recorded, and Hart and Harps do a large amount of work under it, near the point of location, sinking the south Colfax shaft, running a drift, etc. After this Barris and Sproul convey both claims to Blasdel. Blasdel does work at both locations and under each claim, calling the lode the Colfax at one point and the Ward Beecher at the other. Then he conveys all his right, etc., to the Colfax lode to Drake. Subsequently it transpires that the Ward Beecher lode and the Colfax lode are one and the same thing. The plaintiff contends that, although this discovery reduces the Colfax location as a basis of right to the ground to a nullity, it does not impair the effect of the conveyance of the lode, nor prevent the name of Colfax from having been, at the date of the conveyance, a good means of description of the lode. The defendant conveyed a lode or deposit of ore, not a right derived from the Colfax location. He owned that lode under the Ward Beecher location, but he conveyed it by the name given it in the Colfax location.

“The defendant disputes not only the facts out of which the plaintiff frames his hypothesis, but also the correctness of the legal conclusion. Upon the latter point, if I have understood him correctly, he contends that, if the Colfax was located on the same ledge claimed under the Ward Beecher notice, the Colfax location was a mere nullity for two reasons, viz.: Barris and Sproul were incapacitated by their previous location from making any further claim on that ledge, and Hart and Harps, by locating a discovery claim on a previously discovered ledge, committed a fraud on the policy of the law, which rendered the whole claim utterly void. Consequently, the Colfax lode never had an existence, and nothing could pass by conveyance under that name. Moreover, it already had the name of Ward Beecher and continued to retain it, and could not, therefore, be called the Colfax; and further, all proof of the identity of the two ledges is incompetent, because it tends to vary and contradict the terms of written instruments, to wit, the notices of location and the deeds, in which the lodes

are spoken of and treated as distinct. I can not appreciate the force of these objections. There is no solecism involved in the idea that the same ledge may have two names by which it may be known indifferently, especially when it is not known that the parts of the ledge to which the different names are applied are identical; nor is it absurd to suppose that a ledge might become as well or better known under a name derived from an invalid and subsequent location than under that given it in the earlier and valid location. As to the deed and notice, they prove at most, that, at the time they were made, the Colfax and Ward Beecher were considered distinct; and certainly it is not incompetent, for the purpose of giving proper effect to them, to prove that it has since been discovered that the claims are on the same ledge.

“ I agree with the plaintiff that when a man conveys a lode we have only to ascertain, by the best means in our power, what lode of ore he meant; and, if we can do so, it makes no difference that he has called it by a name illegitimately acquired—a name only applied to it by reason of his ignorance of the truth. Effect must be given to his real intention, and the lode intended must be held to have been conveyed. Do the facts sustain the plaintiff's hypothesis? Without referring to any particular portion of the testimony, I presume that it will not be disputed that the statement and the maps referred to and made part of it, show that two immense chambers have been excavated from almost solid milling ore—the one connected by a shaft and cut with the Ward Beecher location and embracing the ground in controversy, the other commencing at the bottom of the Colfax shaft.

“ Although bodies of lime and spar may have been found in these chambers among the ore, there is no dispute as to the ore in the respective chambers having been connected and continuous. The only question is, whether the two chambers are on the same body of ore, that is, whether ore is continuous between them. As they are not actually connected by any drift or other workings, this is necessarily a matter of inference, to be determined by the opinion of experts and natural probabilities. The north chamber connected with the Ward Beecher location has been excavated toward the north some distance beyond the point of location and in the opposite direc-

tion, nearly half way to the Colfax. The chamber under the Colfax shaft is worked out a considerable distance to the south of that shaft, and toward the north to within twenty-five feet, horizontal measurement, of the nearest point in the Ward Beecher chamber. That is to say, for a distance north and south of about four hundred feet, two large continuous bodies of ore are found approaching each other, with a space of twenty-five feet of unexplored ground between. In regard to that space of unexplored ground, what inference shall we adopt? Is it ore and vein matter, or is there a solid barrier of country rock interposing between two distinct bodies or deposits of ore? I think there is a very decided preponderance of evidence in favor of the identity.

“It is true that it is shown that a spar-seam crosses the south end of the Ward Beecher chamber. What inference it is expected will be drawn from the mere proof of this spar-seam, I do not know. There is no evidence in the statement as to what a spar-seam is or indicates. No witness swears that it constitutes a division between lodes in general, or in this instance; and if we assume that we know no more about it than the statement discloses, then its existence proves nothing. But if, on the other hand, we may take notice of its character independent of testimony as a matter of common notoriety, then we know that the spar of this district—calc-spar—is simply crystallized carbonate of lime. The original solid lime rock is dissolved in water, carried into every accessible cavity or fissure, and crystallizes in coarse crystals, filling the cavity, and is called spar. It is necessarily of comparatively recent formation; and where a seam of it is found cutting across the country with ore contiguous to it on either side, the plain and inevitable inference is that, at some epoch subsequent to the deposit of the body of ore, a fissure occurred which in process of time has been filled with the spar. Of course, therefore, its existence is no impeachment of the identity of the bodies of ore in which it occurs. The fact that the rock behind this spar-seam contains but little ore, proves nothing. The testimony is, that the Ward Beecher chamber is on a level; and the map shows that, at the south end it breaks out to the surface, while at the whim-shaft the bottom of the chamber is ninety feet deep. Memoranda

connected with Attwood's assays, show that the deepest point from which he took specimens at the south end of the Ward Beecher chamber, was forty-five feet from the surface. From this slight testimony, which is all I can find in the statement bearing on the point, the truth may be inferred—that the hill slopes from the north to the south, and that the farther south you go on the Ward Beecher chamber the nearer you approach the surface. Bearing this in mind, it will not appear surprising but on the contrary most natural, that the testimony should show that the ground back of the spar-seam—near the surface as it is—is composed of debris, broken lime, spar and surface dirt, mixed with a little ore. Such is the character of the surface from one end of the claim to the other. It is vein matter, but not solid ore. It is seventy-four feet from the mouth of the Colfax shaft to the top of the 'lady's chamber,' and solid ore is not found in that shaft till you reach within nine feet of the top of the chamber; the rest of the shaft passes through a debris of broken lime, spar, etc., mixed with occasional bunches of ore.

“The testimony introduced by the defendant as to the want of connection between the location point of the Montrose, and the ore in the Montrose shaft—which are, respectively, a few feet north and south of the Ward Beecher cut—shows that the surface about the Ward Beecher cut is of the same character, and that it is at some depth that milling ore is encountered at that point. The numerous shafts sunk throughout the distance between the Ward Beecher and the Colfax and the proved depths of some of them and the depth of the large chambers out of which milling ore has been taken, in the absence of more direct testimony, prove satisfactorily two things, which in point of fact are true: that the solid milling ore does not come to the surface and that the vein matter does. For, if the ore came to the surface, it would be worked from the surface; and the shafts would not have been sunk if the vein matter had not cropped out to indicate the existence below of something to sink for. I consider myself amply warranted in finding that it is established by a clear preponderance of testimony, that there is one lode or deposit of ore extending from north of the Ward Beecher location to the south of the Colfax.

“In November, 1867, Barris and Sproul located the Ward Beecher by posting the notice on a monument, erected at the west end and south side of the Ward Beecher cut. They recorded and perfected their claim by full compliance with the mining laws and acquired a perfect title to six hundred feet of the lode, extending three hundred feet to the north and three hundred feet to the south from the monument. Afterward, on the twenty-seventh of June, 1868, in conjunction with Hart and Harps, they located the Colfax—Barris and Sproul taking the four hundred feet to the north of the notice, and Hart and Harps taking the six hundred feet, including the discovery claim, to the south. There is some conflict of testimony as to the exact point of the Colfax location. But it is immaterial where exactly it was made. Taking the defendant's own testimony, which I shall adopt on this point, it was about three hundred and ten feet south of the Ward Beecher monument, ten feet east and ten feet north of the south Colfax shaft, and twenty-five feet south of the north Colfax shaft. This location was recorded and perfected by work done by Hart and Harps, or if their work did not apply to the north end, then by work done by Blasdel after his purchase. Barris and Sproul then sold the Ward Beecher and Colfax claims, together with the Montrose and the Barris & Sproul, to Blasdel. (Deed of Oct. 8, 1868.) Blasdel then commenced work on the ground, and, prior to his sale to Drake in September, 1869, had made some slight developments. The testimony as contained in the statement does not show with any clearness the state of development of the ground at the date of that deed. This is to be regretted, as it is desirable in endeavoring to arrive at the intention of the parties to place ourselves as nearly as possible in their shoes, to know what they knew, to be ignorant of all they did not know, to see the ground as they saw it.

“We can only gather from the statement that a slight amount of surface work had been done in the vicinity of the Ward Beecher cut. That cut had been made and some other open cuts or trenches, and the Antuin shaft had been started. At the Colfax, Hart and Harps had sunk the south Colfax shaft, finding ore at a depth of twelve feet, and had run a little drift from the bottom of the shaft to the south. Blasdel

had commenced the north Colfax shaft. (I take his own testimony on this point.) It does not appear to what depth it had reached; but Blasdel says he had commenced sinking it; that he was sinking for a ledge and doing it for the Colfax. Down the hill to the west, Blasdel had sunk the Ward Beecher shaft 'all the way down,' that is, I suppose, to its present depth.

"This is about all we can gather as to the state of development on the ground at the date of the deed. Under these circumstances, Blasdel conveyed to Drake all his right, etc., to the Colfax lode, etc. What lode? What deposit of ore did he have in his mind when he said Colfax lode? The notice of location of the Colfax claim was headed 'Colfax Lode.' Placing it upon a lode was to christen it by that name. Blasdel himself had commenced a shaft which he called the 'North Colfax Shaft'; he was sinking it for a ledge; he was doing the work in connection with the Colfax location, and for that claim. When, therefore, he spoke of the Colfax lode, could any body doubt what lode he meant? Is it not apparent that he meant that lode on which or for which he was sinking? If there could be any doubt of his meaning, is not that doubt resolved by the fact that Drake immediately went into possession of that lode, and that Blasdel acquiesced in that possession and that of his grantees for nearly two years? It seems to me that the case is too plain to be better illustrated than by its bare statement. But for the fact that counsel have so strenuously argued, and that a jury has found to the contrary, I should have thought no elaboration of the view I have taken necessary.

"Much testimony was introduced as to the character of the ground between the Montrose location and the solid ledge, and also as to that between the top of the Colfax shaft and the 'lady's chamber.' The testimony of the defendant's witnesses was, that there was no ore connection between the location monuments and the ore chambers nearest to them. The plaintiff's witnesses swore to a vein connection—a connection in vein matter. The witnesses all agree that the vein matter of the district is broken lime, spar and quartz mixed; that lime and spar are found mixed with the richest ore and often in considerable quantities; in other words, that portions of

ledges, sometimes greater, sometimes less in extent, are barren. It is not, however, a very material question whether there is an ore connection or not between the surface where the Colfax notice was posted and the ore chambers beneath. In order to hold a ledge, it is not necessary that the notice should be placed on the ore or any part of the vein or lode. It is sufficient, as the jury was instructed, if the notice is placed in such reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended. Here is the case of a ledge, deep in the ground, not appearing at the surface in the shape of solid ore, but only in vein matter. There is on the surface broken lime, spar, debris, mixed with small quantities (occasional bunches) of ore. This was deemed by the locators of the Ward Beecher and Colfax, and the event proves with reason, a good indication of a ledge beneath, if not a ledge itself. They made their locations on these croppings, and sank shafts for the ledges. Can any court go to the length of holding that the notices and the work did not give reasonable notice as to what ground was claimed? If it could be so held, what would become of the Ward Beecher claim itself? * * These views, if correct, are, in my opinion, conclusive. * * * I think a new trial ought to be granted, and it is so ordered.

“W. H. BEATTY, D. J.”

To show that this order should be affirmed, I think but little need or can be added to the foregoing very able and perspicuous statement. The correctness of its exposition of the facts and testimony is not assailed; but it is argued “that the question is here, as it was below—is the evidence insufficient *in law*? that it is error to grant a new trial upon the ground of insufficiency of the evidence, where there is a substantial conflict of testimony, for the jury and not the court must respond to questions of fact.” I do not so understand the law. By a rule almost coeval with the maxim quoted, certainly one as deeply rooted in the law, the *nisi prius* judge has jurisdiction, on motion for a new trial, to decide, as a question of fact, whether the scale of evidence which leans against the verdict very strongly preponderates: 3 Black. Com. 392. It is not enough to authorize the appellate court

to reverse such decision, that the evidence appears fully to support the verdict. It will only be reversed for the most cogent reasons, such as a conclusive preponderance of evidence in favor of the verdict: 21 Cal. 414; 21 Iowa, 337.

I understand the counsel for the appellant to contend for such a preponderance on one point only, viz.: the intention to take the Ward Beecher ledge by the Colfax location. This intention, it is argued, is conclusively negatived by the circumstances; that the Colfax recognizes the Ward Beecher location and is parallel to it, and that the locators claim the discovery of a ledge. If these circumstances are conclusive of anything, it is that the locators of the Colfax believed it to be a newly discovered and unappropriated vein, not of the absence of an intention to locate it in consequence of such belief. In fact, Sproul swears that the Colfax was located for the protection of the Ward Beecher, and was located and worked under the impression that they were one and the same. There is nothing in the fact that a discovery claim was taken by Hart and Harps to conclusively impeach this statement of Sproul. The Colfax notice reads:

“COLFAX LODGE.

“We, the undersigned, claim 1,000 feet on this lode, 600 ft. south, 400 ft. north from this monument.

“South.

North.

“H. Harps, 300.

L. Barris, 200.

“L. J. Hart, 300.

E. R. Sproul, 200.”

Barris and Sproul did not become tenants in common with Hart and Harps of the whole one thousand feet. They attempted to acquire a segregated claim of four hundred feet running north. Their title to this could not be vitiated by reason of any excess in the number of feet claimed by Hart and Harps. Barris and Sproul took up just the number of feet they had a right to take on the hypothesis that they were making a relocation.

In favor of the order, we must assume every fact which the district judge finds a clear preponderance of evidence for, and which we can not find a clear preponderance against. We must, therefore, assume, at least, that the Colfax notice was posted within a few feet of the shaft upon which the first work

was done under it; that before the deed in question was executed, this shaft had been sunk ten or twelve feet and a drift run in the ledge; that, from the very top of it, it was within the walls of the ledge or the lateral boundaries of the deposit, and that this work was done for the purpose of holding this ledge. Upon this assumption of fact, we can not say, as an inference of law, that this was not a location—in fact and in intention—of the 300 feet of the ledge in dispute, lying next south from the Ward Beecher location monument; that the title so acquired would not have sustained an ejectment against a subsequent appropriation of even date with said deed, and a recovery thereby of that 300 feet of this very ledge, as and because it was the Colfax ledge; nor that said 300 feet would not pass by conveyance as part of the same. There is no law to prevent a party from relocating his own claim by a different name; and if he does so and then conveys it by the latter name, I can see no reason why the existence of the former location should invalidate the deed. Of course he can not thus acquire title to more ground than the law allows him to locate. But that which he had a right to relocate would pass by the deed, notwithstanding the nullity of the relocation to the extent of the excess. However, it is only necessary in this case to affirm the ruling that, by the Colfax location, this ledge acquired a name and description by which it could be conveyed.

The deed from Roberts to Phillpotts, for and in consideration of fifty thousand dollars in hand paid, grants, bargains, sells, remises, releases, conveys and quitclaims the premises described, to have and to hold to said Phillpotts, for use and benefit of the Eberhardt and Aurora Mining Company. It is contended that the legal title vested in said company and that, therefore, the action should have been prosecuted in its name. The argument is, that having adopted the common law, the English statute of uses, passed before the colonization of America, is here in force and by it the use was executed. The position that the statute of uses is part of our law is supported by an imposing array of authority; but, if this is to be considered as a deed of bargain and sale, it is clear that the legal title remained in Phillpotts. In the language of Blackstone, no use can be limited on a use, and when a man bargains and

sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant and therefore void; but, though not a use which the statute can execute, yet still it is a trust in equity, which in conscience ought to be performed: 3 Com. 336; 5 Wallace, 282; 17 Cal. 44.

The rules laid down in respect of the construction of deeds, says Lord Mansfield, are founded in law, reason, and common sense that they shall operate according to the intention of the parties, if by law they may; and if they can not operate in one form, they shall operate in that which, by law, will effectuate the intention. If this had been simply a feoffment with livery, or a release to one already clothed with an estate in possession, it may be that the company would have taken the legal title, even in opposition to the intention of the parties, on the principle that the will of the subject can not control the express enactment of the legislature. But if our statutes have not rendered livery of seizin and possession in the releasee unnecessary to the respective efficacy of a feoffment and release, it is clear that we should construe this deed to be a bargain and sale, because in that way alone it can then have the operation intended, or any operation.

In some of the States statutes have been passed providing in terms that the feoffee shall be seized without livery and the releasee without possession, but I can find no such or equivalent provision in the statutes of this State. And on the supposition that the statute of uses is here in force, no inconvenience can result from the absence of such enactments. For a feoffment without livery, or a quitclaim to one not in possession would still pass the legal title, by raising a use, which the statute at once executes: 2 Smith's Leading Cases, 521. I am satisfied that this is the correct view, and that this is to be treated as a deed of bargain and sale, which by force of the statute of uses conveys the legal title to Phillpotts in trust for the company—a trust cognizable only in a court of equity.

But even if it can be held that the provision in our statutes for the recording of deeds dispenses with the common law requisite of livery of seizin, and that the recording of a deed takes the place of livery, and is equivalent to it, there is

still sufficient authority that this action was well brought in the name of Phillpotts as the proper party plaintiff. For we would then have, as stated in *Matthews v. Ward, infra*, a deed capable of transferring the estate either as a feoffment, release, or bargain and sale—the operative words of each species of conveyance being used. The question then would be, not whether, if it can not operate in one way, it shall in another; but what is the character of the deed in point of law? The intention of the parties was, undoubtedly, to vest the legal title in Phillpotts, otherwise the conveyance would have been made directly to the corporation. By law it may operate as a bargain and sale, and so to construe it will most effectually accomplish the intention of the parties. And such construction does no violence to the language used, which expresses an intention to convey the estate by means of a bargain and sale; or, as laid down in Smith's Leading Cases, the deed may be regarded either as a statutory grant, or as deriving its effect from the common law or the statute of uses, as will best subserve the object for which it was executed. *Matthews v. Ward's Lessee*, 10 G. & J. 448; *Guest v. Farley*, 19 Mo. 157.

According to Blackstone, the only service to which the statute of uses was consigned in England at the time of the colonization of this country, was in giving efficacy to certain species of conveyances; and that service we allow it to perform here, by acting once on this deed and executing the use created by it into a legal estate in Phillpotts.

I think the order appealed from should be affirmed.

SOBEY ET AL. V. THOMAS ET AL.

(39 Wisconsin, 317. Supreme Court, 1876.)

¹ **Negative testimony.** The rule in respect to the relative value of positive and negative testimony has no application to the case where one party to a verbal mining lease testifies that it did, and the other that it did not, include certain premises.

Lease of tortuous vein. When lessor demised the "Watkins Range or Works," being a vein or deposit of lead and zinc ore supposed to bear a certain general course, but which was afterward traced to the east

¹ *Tiley v. Moyers*, 4 M. R. 320.

line of the quarter section on which the discovery was situate, and thence through the lands of other parties by a circuitous course back into another part of the said quarter section, but there was no connection directly through the lessor's land or the said quarter section to the point where the deposit was traced back into such quarter section, at which point it had (after the lease granted but before the connection proved) been discovered and worked by other parties: *Held*, that the lessee's right terminated when he reached the east end of his lessor's ground, being the east line of the quarter section, and did not extend to that part of the deposit within the lessor's tract as traced back, because not proved to connect on the same tract; and that the fact that the deposit was a horizontal seam did not affect the case, since lessee's right terminated when they reached the exterior line of the lessor's ground.

¹ **License to mine, exclusive.** An oral contract allowing a party "to mine and dig for lead and zinc ore according to mining usage:" *Held*, to amount to an exclusive lease.

Mining statute—Special contract. The statute of Wisconsin governing the rights of miners, applies only where there is no special contract or lease fixing the rights of the parties.

Appeal from the Circuit Court for Iowa County.

Action to restrain defendants from digging and mining on premises described in the complaint. The complaint alleged, in substance, that N. W. Dean was the owner of a certain quarter-quarter section of land, on which there was a valuable range of lead and zinc ores known as the Watkins range; that Dean, by his agent Reese, had granted to the assignors of the plaintiffs an oral lease "to mine and dig for lead and zinc ore, according to mining usages, upon any and every part of so much of the said quarter-quarter section as lies north of a line running east and west across the same so far south as to embrace the said Watkins range;" that while plaintiffs were in peaceable possession of said premises, defendants had entered and commenced mining thereon, and were continuing to dig and carry away ores therefrom, which ores formed a part of the range worked by plaintiffs. The answer, in substance, denied that plaintiffs, by their lease, had the exclusive right to mine upon said land or any part thereof, outside of the said Watkins range proper; denied that the "discovery made by the defendants, or the ores therein contained, are or is connected with the range of the plaintiffs;" admitted that defendants were mining upon the quarter-quarter section de-

¹ *Harkness v. Burton*, 39 Iowa, 101; *Post* LICENSE.

scribed in the complaint; but alleged that they had made an entirely new and independent discovery, etc.

The evidence as to the terms of the lease to the assignors of the plaintiff was conflicting, William Owens testifying that Reese leased Watkins range and also that portion north of the range as far north as Evan Williams land; while Reese testified that he only leased Watkins range, and that nothing was said about the land north to the line. It appeared that the quarter-quarter section described in the complaint was bounded on the east by the land of Hugh Jones, and on the north by the land of Evan Williams; that the Watkins range had been abandoned and unworked for many years up to the time of the lease by Reese; that striking the west line of the forty-acre tract a little north of the middle thereof, it extended across the tract in a south-easterly direction, and had formerly been worked to within about 300 feet of the east line; that it was a "flat opening," that is, the seam containing the ores was nearly horizontal, and its width unascertained, varying from a few feet in some places to several hundred in others; that the location of defendant's shaft was upon and near the north-east corner of the forty-acre tract, and about forty-nine rods north of the point at which the range was supposed to cross the east line of the forty; that shafts had been sunk and ores found and worked to a considerable extent on the land of Hugh Jones, extending in a north-easterly, and thence in a north-westerly direction, and toward the shafts of the defendants. Much testimony was introduced upon the question whether the defendants' diggings were connected with and a part of the Watkins range, and the evidence upon this issue was conflicting.

The court submitted to the jury the following questions: 1. "Is the point of land at which the defendants were working, as described in the complaint, included within the terms of the lease made by N. W. Dean, by his agent Reese, to the assignors of the plaintiffs, or to the plaintiffs themselves, independent of the question whether it is the same range as that known as the Watkins range?" 2. "Is the range of ores at the point of land at which the defendants were working, as described in the complaint, the same range of ores leased to the assignors of the plaintiffs, known as the Watkins range?"

It was admitted in open court that when the lease was made by Reese, the range on Dean's land was not worked by any one, and that Dean was the only person having any title thereto; and that before that time the range on Hugh Jones' land, which the plaintiffs claim to be a continuation of the Watkins range, was discovered by miners, and that the same was worked upon by Jones or his lessees before, at and since the time of Reese's lease to the plaintiffs. Thereupon the court also submitted to the jury the following question: 3. "The foregoing facts being admitted, does the lease of the Watkins range to the plaintiffs entitle them to the diggings and mineral struck by the defendants?"

The jury answered the second question affirmatively, and the other two negatively. The judge adopted these answers in his findings of fact, and held, that the discovery of the range or vein of ore on Jones' land, made while the Watkins range was abandoned and unworked, was, as against any miner subsequently on the old Watkins range, a prior discovery of that vein, and entitled the discoverers to follow the vein to the limits of the land on which such discovery was made, unless restricted by some contract with the owner of the land; that such discovery "cut off the Watkins range and terminated the rights of any subsequent lessees of that range;" and that, in the absence of any proof of a mining custom to the contrary, a lease of the Watkins range, without a special provision for that purpose, did not confer on the lessees the right to mine upon such vein, in case it should be found to run back upon the Dean land.

Judgment for the defendants; from which plaintiffs appealed.

MOSES M. STRONG and M. M. COTUREN, for appellants.

WM. E. CARTER, for respondents.

COLE, J.

The material question in this case is, what rights and privileges were embraced in the verbal lease which was made by Reese, the agent of Dean, with the assignors of the plaintiffs? It was alleged in the complaint, and testimony

was offered in support of the averment, ~~that~~ the lease gave the plaintiffs the right to mine not only upon what was known as the Watkins range or works, but also upon any and every part of the forty-acre tract north, up to Evan Williams' land. But this claim was distinctly negatived by the verdict of the jury and the finding of the circuit court; and we are entirely satisfied that it can not be maintained upon the evidence. The question as to the extent of the rights granted by the lease must be mainly determined upon the testimony of the witnesses Reese and William Owens. The former clearly and positively states that it was only the Watkins works or range which was leased; and his testimony is corroborated by some facts which appear in the testimony of other witnesses. But were it otherwise, we should consider his unsupported statements in respect to the lease as more reliable and entitled to greater credit than the statements of William Owens, who is certainly not so intelligent a witness, and who would be more likely to be mistaken upon the terms of the lease. The learned counsel for the plaintiffs insists that, giving due weight to positive as against negative testimony, it is satisfactorily shown that the lease embraced all of the tract north of the Watkins range, as well as that range proper. But we do not understand that the rule in respect to the effect of positive as against negative testimony applies. The statements of both witnesses are positive in their character; the one that the lease only included what was known as the Watkins work or range, and nothing more, the other that it embraced that range, whatever it might be, and all the rest of the land up to Williams' land. Both witnesses testify as to facts, or in other words as to the real terms of a verbal contract entered into between them. So that we can not perceive how the doctrine of *Ralph v. The Chicago & Northwestern R'y Co.*, 32 Wisc. 178, can have any application.

Independent of the question, then, whether the mine or diggings of the defendants were actually upon the Watkins range, it seems to us it is quite impossible to maintain the position, upon the proofs in the case, that the ground which was being worked by them was originally included in the lease, because no right was given to mine on any land distinct from and separate from that range. This is a fact which we consider to

be fully and clearly established by the evidence. We shall enter upon no further examination of the testimony bearing upon the question, but state the conclusion which we have reached in reference to it.

This leads to the inquiry as to what was included in the Watkins range or works, which, it is admitted, were leased to the assignors of the plaintiffs, and upon which their right to mine was exclusive. On that question our opinion is, that the lease of the Watkins range carried with it, or included the right to take out and appropriate, on the payment of the stipulated rent, all the ores and minerals which might be found in the old works, and also the minerals which should be found in the unbroken ground between the easterly point of the old works and the east line of the tract. We think that this was the extent of the privileges and rights granted by the lease, and that when the east line was reached in following the Watkins range, the plaintiffs' rights terminated. In view of the circumstances surrounding the transaction, it is unreasonable to suppose that any further rights were intended to be granted or secured by the lease. The counsel for the defendants suggests, rather than argues, that the lease only gave the plaintiffs the right to mine on the old Watkins range to the extent to which it had actually been opened and worked, and that it did not confer the right to follow the range to the east line of the forty. But we are unable to adopt that view of the case. We think nothing less than the right to work and prove the Watkins range to the east line of the tract was intended to be granted; and we have little doubt upon the evidence that this was the real understanding of the parties when the verbal lease was entered into.

Nor can we perceive that the plaintiffs' case derives any aid from the statutes regulating the rights of miners: Ch. 260, Laws of 1860, and Ch. 117, Laws of 1872. These enactments lay down certain rules and regulations which govern mining contracts and leases when not contrary to the terms established by the landlord, and in the absence of any express agreement fixing the rights. It is unnecessary to dwell upon the various provisions of these acts. The third section, in effect, provides that the person making a discovery of a crevice or range containing ores or minerals, shall be entitled to the ores or min-

erals pertaining thereto, subject to the rent of the landlord as well before as after such ores or minerals have been separated from the freehold; and he may recover the ores or minerals, or the value thereof, from any miner digging upon his range with notice of his claim. This provision obviously secures to the discoverer the right to develop the range or crevice to the limits of the land on which he has the privilege to mine, and vests in him the title to whatever ores or minerals he may find therein. But how does the provision strengthen the claim or aid the rights of the plaintiffs upon the facts of this case? It is said that the ores or minerals found at the place where the defendants were at work *pertained* to the Watkins range or works, or, in other words, that they were taken from that range; but how is that fact ascertained and determined? By the plaintiffs attempting to trace their range several hundred feet around through the adjoining land of Hugh Jones on the east, thence back onto the land of Mr. Dean. But is it at all probable that the parties intended or supposed when the lease was entered into, that any such rights were conferred by it? The Watkins range, as then known, had a well defined course in a south-east direction; and we must presume that the parties knew that fact and contracted with reference to it. And it is quite incredible that they then understood that the right to work the Watkins range, carried with it the right to follow that range to the east line of the forty, and upon permission being obtained, to trace the range through the adjoining tract; and also the further right to follow the range back onto the north-east corner of the Dean tract. The verbal lease should be read in the light of surrounding circumstances; and if it is, the claim of the plaintiffs will be found unsupported by all the facts and probabilities of the case. If the plaintiffs, while developing their mine on the Dean land, had actually traced the Watkins range to the point where the defendants were at work and established the identity of the defendants' diggings with the Watkins range, a different question would be presented. There would then be ground for claiming that the ores and minerals mined by the defendants belonged to the plaintiffs and *pertained* to their range. In this remark, however, we do not wish to be understood either as affirming or disaffirming the correctness of the theory of the circuit court

as stated in the conclusions of law. That theory goes upon the assumption that there was a prior discovery of the range or vein on Jones' land while the Watkins range was abandoned and unworked which restricted the rights of the plaintiffs. This may be so; still our judgment is not placed upon that ground. We think the lease of the Watkins range only gave the right to mine upon that range to the east line of the tract.

We have not overlooked the fact that the Watkins range was what is described by the witnesses as a "flat opening," the ores being found in a horizontal instead of vertical seams. The limits or borders of this opening on the north are not known, and have never been traced. Possibly the opening may extend to and include the vein where the defendants are working. But whether it does or not is doubtful and undetermined. The plaintiffs do not pretend they have traced the Watkins range by drifting north on the Dean tract up to the defendants' works. They claim that they have established a physical connection between the ores in the works and their own by following the Watkins range around through the diggings on Jones' land back again onto Dean's land. But we have already said that the lease of the Watkins range terminated at the east line of the tract, and carried no rights beyond that point.

This is the controlling question in the case, and renders a consideration of the other exceptions unnecessary.

By the Court: *The judgment of the circuit court is affirmed.*

1. A mortgage described "all the property owned by the Montana Flume and Mining Company" at and near Alder Gulch, etc., in section 10. The property of the company was situate in sections 10, 11, 13 and 14: *Held*, that only that property in section 10 was covered. *Largey v. Sedman*, 3 Mont. 473.

2. Description in ejectment, of premises as "limestone quarry containing about three acres." *Clement v. Youngman*, 40 Pa. St. 341; *Post EJECTMENT*; *Youngman v. Linn*, 2 M. R. 443.

3. Incomplete description in mortgage may be supplied in the complaint followed by parol evidence. *Began v. O'Reilly*, 32 Cal. 11.

4. The word "North" in boundary line of claim shown by parol to mean the magnetic meridian. *Jenny Lind Co. v. Bower*, 11 Cal. 194; *Post EVIDENCE*.

5. Courses in a deed are to be run according to the magnetic meridian. *Wells v. Jackson Co.* 47 N. H. 261.

6. Description of lead range *held* insufficient. *Cox v. Groshong*, 1 Pinn. 307; *Post* FORCIBLE ENTRY.

7. Description as the "Heathcock Range," controlled by mention of government subdivisions. *Ross v. Heathcock*, 3 M. R. 404.

8. Description of Quartz Mill by its name *held* sufficient. *Tibbetts v. Moore*, 23 Cal. 208; *Post* LIEN.

9. Deed of Lode by one of its names carries the vein, where it is located under two names and held by same grantor: *Phillpotts v. Blasdel*, *supra*, affirmed; *Weill v. Lucerne Co.* 3 M. R. 372.

10. Description required in Location Certificate under U. S. Mining Acts. *Faxon v. Barnard*, 2 McCr. 44; *Post* LOCATION.

11. Description is good where the monuments when ascertained by parol evidence, identify the claim. *Meyers v. Farquharson*, 3 M. R. 217.

12. Sufficient call for permanent objects or natural monuments in Location Certificate under the Act of Congress of 1872. *Jupiter Co. v. Bodie Co.* 7 Saw. 112; *Post* DISCOVERY.

13. In description, subsisting and true monuments control course and distance; calling for "stump" as a post in a mining record. *Pollard v. Shively*, 2 M. R. 229.

BAIRD ET AL. V. WILLIAMSON ET AL.

(15 C. B. N. S. 376. Common Pleas, Eng. 1863.)

¹ **Servitude of lower mine.** The owner of a mine at the higher level has a right to work his whole mine, in the manner usual and proper for getting out the minerals; and is not liable for any water which flows by gravitation into the adjoining mine from works so conducted. But he has no right by pumping or otherwise to be an active agent in sending water from his mine into the adjoining mine.

This was an action by the owners of a mine against those of an adjoining mine for so working as to flood the mine of the plaintiffs.

² The first count of the declaration stated, that, before and at the time of the committing of the grievances by the defendants, as thereafter in that count mentioned, the plaintiffs were possessed of a certain ironstone mine lying and being in a certain vein or seam of ironstone called the Red Shagg ironstone seam [which was a stratum of such a nature as to allow water to percolate and pass through it, as the defendants then well knew]. And the defendants before and at the time aforesaid were also possessed of certain ironstone mines lying and being in the same vein or seam near and adjoining to the said mine of the plaintiffs, but being on a higher level than the said mine of the plaintiffs, so that the water introduced into the said vein or seam in the defendants' said mines would run down from the same and pass into the plaintiffs' said mine from the said mines of the defendants, the stratum or floor on which the said vein, seam and mines lay being impervious to water, and by means thereof, and of the dip or inclination thereof, preventing such water from escaping deeper into the earth or otherwise than into the plaintiffs' said mine, as the defendants then [also] well knew; yet that the defendants, intending to escape the expense of themselves raising to the surface of the earth, the water next

¹ *Att'y Gen. v. Birmingham*, 4 Kay & J. 542; *Clegg v. Dearden*, 12 Q. B. 576; *Post DRAINAGE*; *Locust Co. v. Gorrell*, 9 Phila. 247; *Post DRAINAGE*.

² The words within the brackets were, after the demurrers were disposed of, struck out, and those in the foot-notes inserted in the various parts of the pleadings, by arrangement between the parties; and the second plea and the demurrer thereto were struck out of the record.

thereinafter mentioned, and to throw that expense upon the plaintiffs, by means of certain pumping engines and of certain cruts or openings made by them between the said stratum of ironstone and divers lower strata in the earth, in which large quantities of water arose, and in divers whereof the defendants were then working, or preparing to work the mines, wrongfully introduced and threw into their said first mentioned mines great quantities of water, arising in and coming from the said lower strata, and such water ran down from such mines of the defendants to the boundary of the [plaintiffs' portion of the said stratum of ironstone],¹ and passed into and through the same and into the said mine of the plaintiffs,—by means whereof the plaintiffs were hindered and prevented from working their said mine so conveniently and profitably as they otherwise might and would have done, and were put to great expense in pumping and raising the said water from their said mine to the surface of the earth.

The second count stated, that, before and at the time of the committing of the grievances by the defendants as therein-after in that count mentioned, the plaintiffs were possessed of a certain other ironstone mine lying and being in a certain vein or seam of ironstone called the Red Mine ironstone seam [which was a stratum of such a nature as to allow water to percolate and pass through it, as the defendants then well knew]; and the defendants before and at the time last aforesaid were also possessed of certain other ironstone mines lying and being in the same vein or seam near and adjoining to the said last mentioned mine of the plaintiffs, but being on a higher level than the said last mentioned mine of the plaintiffs, so that water introduced into the said last mentioned vein or seam in the defendants' said last mentioned mines would run down from the same and pass into the plaintiffs' said last mentioned mine from the said last mentioned mines of the defendants, the stratum or floor on which the said last mentioned vein, seam, and mines lay being impervious to water, and by means thereof, and of the dip or inclination thereof, preventing such water from escaping deeper into the earth or otherwise than into the plaintiffs' said last mentioned mine, as the defendants [also] then well knew. Yet that the defendants,

¹Said mine.

intending to escape the expense of themselves raising to the surface of the earth the water next thereafter mentioned, and to throw that expense upon the plaintiffs, by means of certain pumping engines and of certain cruts or openings made by them between the said last mentioned stratum of ironstone and divers lower strata in the earth in which large quantities of water arose, and in divers whereof the defendants were then working or preparing to work the mines, wrongfully introduced and threw into their said mines in this count first mentioned, great quantities of water arising in and coming from the said lower strata, and such water ran down from such last mentioned mines of the defendants to the boundary of the plaintiffs' [portion of the said last mentioned stratum of ironstone]¹ and passed into and through the same, and into the said last mentioned mine of the plaintiffs—by means whereof the plaintiffs were hindered and prevented from working their said last mentioned mine so conveniently and profitably as they otherwise might and would have done, and were put to great expense in pumping and raising the said water from and out of their said last mentioned mine to the surface of the earth.

Second plea, to the first and second counts respectively: That the said veins or seams of ironstone, in those counts respectively mentioned, were not respectively strata of such a nature as to allow water to percolate and pass through them respectively, nor could water introduced into the said veins or seams respectively in the defendant's mines, in those counts respectively mentioned, run down from the same and pass into the said mines of the plaintiffs, in those counts respectively mentioned, as in those counts respectively alleged.

Third plea, to the first and second counts respectively: That the said cruts or openings, in those counts respectively mentioned, were made by them, as in those counts respectively mentioned, for the purpose of reaching the said lower strata in the earth, and of working, getting and winning the mines and minerals of them, the defendants, situate in the said lower strata respectively, and not for any other purpose, and were so made by them according to the usual, proper and recognized manner and course of mining, and were so made with all due care in that behalf; that the said great quantities of

¹ Said last mentioned mine.

water, in those counts respectively alleged to have been introduced and thrown by the defendants into their said mines, in those counts respectively mentioned, by means of the said cruts or openings and of certain pumping engines, were certain quantities of water which ran, flowed and passed by, through and along the said cruts or openings from the said lower strata respectively to and into the said other mines of the defendants by gravitation and by the action of other natural forces, independently and irrespectively of any pumping or drawing of the same by the defendants; and that the said water afterward ran and passed from the said last-mentioned mines of the defendants to and into the said mines of the plaintiffs, in those counts respectively mentioned, under ground, by natural percolation through the strata of the said last-mentioned mines of the defendants and the plaintiffs respectively, and not otherwise.

The defendants also demurred to the first and second counts, the ground of demurrer alleged being "that those counts do not show any wrongful act done by the defendants, or any invasion by them of any right or easement to which the plaintiffs are entitled." Joinder.

The third count of the declaration stated, that, before the committing by the defendants of the grievances thereafter mentioned, the defendants were possessed of divers mines and strata of ironstone lying in and under certain land, which strata were called the red shagg ironstone and the red mine ironstone, and also of divers other mines and strata of minerals lying under the said mines and strata of ironstone in that count mentioned; and the defendants, for the purpose of getting rid of the water from the mines and strata so as aforesaid lying under the said ironstone, made certain cruts or communications between the said lower strata and the said strata of ironstone, and thereby and by means of pumping and otherwise conducted, raised and introduced great quantities of the water arising in the said lower strata into the said mines and strata of ironstone of which the defendants were possessed as in that count before mentioned, and conducted such water to certain reservoirs at the foot of a certain pumping-pit of the defendants, from and out of which the defendants by means of certain engines and pumps raised the said water through the said pumping-pit to the surface of the

earth, and there discharged it, and by that means cheaply and conveniently to themselves carried on their works and got rid of the water from the said lower strata; that afterward and while the defendants were getting rid of the said water from the said lower strata, by the means and system aforesaid, the plaintiffs were possessed of parts of the said two strata of ironstone adjoining to the parts thereof so possessed by the defendants as in that count before mentioned, and being so possessed, worked mines therein and got out thereof large quantities of ironstone, and thereby left large unfilled hollows or spaces in their said mines and parts of the said strata of ironstone; that the said strata of ironstone were of such a nature that water could not be kept from passing from one excavated part thereof to any other by means of a barrier, but were pervious to water, which would and did readily pass through the same, as the defendants at and before the time in that count aforesaid well knew; that the inclination of the said strata was upward from the plaintiffs' to the defendants' portion thereof, and that the strata or floors on which the said veins or seams of ironstone rested were impervious to water, so that water introduced into the defendants' portion of the said strata of ironstone did not nor would sink into the earth, but descended toward the defendants' said portion thereof, and when the pumps of the defendants at their said pumping-pits were stopped, such water would rise above the said reservoirs and in the defendants' mines against the boundary of the plaintiffs' said portions of the said seams of ironstone, and would escape through the same into the plaintiffs' said mines, and fill the same and the said hollows and spaces—all which the defendants well knew before and at the time of committing the said grievances in that count mentioned. Yet that the defendants, intending to escape the expense of themselves raising to the surface of the earth the water from the aforesaid lower strata, and to throw that expense upon the plaintiffs, after the plaintiffs had begun to work and whilst they were working their said mines of ironstone, wrongfully continued to introduce in manner aforesaid the water from the said lower strata into their said strata of ironstone, and wrongfully discontinued to work their pumps at the said pumping-pit or otherwise to raise the said water which they so continued to introduce as aforesaid to the surface of the

earth, and allowed the same to rise above the levels of the said reservoirs, and above the levels of the plaintiffs' said boundaries, and to pass into the plaintiffs' said mines and the hollows and spaces aforesaid, whereby the same were filled and overflowed, and the plaintiffs were unable to work their said mines so conveniently and advantageously as they otherwise might and would have done, and were put to great expense in pumping and otherwise getting rid of the said water from their said mines.

Fifth plea to the third count, that the said cruts and communications in that count mentioned were made by the defendants for the purpose of reaching the said lower strata, and of working, getting and winning the mines and minerals of them, the defendants, situate in the said lower strata, and not for any other purpose, and were so made by them according to the usual, proper and recognized manner and course of mining and were so made with all due care in that behalf; and that the said great quantities of water in that count alleged to have been conducted, raised, and introduced into the said mines and strata of the defendants as therein mentioned, and to have been conducted to the said reservoirs by means of the said cruts or communications, and of pumping and otherwise, were certain quantities of water which ran, flowed and passed by, through and along the said cruts or communications from the said lower strata, respectively to and into the said other mines and strata of the defendants in that count mentioned, by gravitation and other natural forces independently and irrespectively of any pumping or drawing of the same by the defendants.

The defendants also demurred to the third count, the ground of demurrer alleged being the same as that alleged for demurrer to the first and second counts. Joinder.

The plaintiffs demurred to the second plea on the ground that, "even if there was no barrier at all left by the plaintiffs, the defendants can not justify the introduction of foreign water into the mines." Joinder.

The plaintiffs also demurred to the third and fifth pleas, the ground alleged being, "that although the mode adopted be a proper and recognized mode of mining, it will not justify the introduction of foreign water into a vein of mineral,

when it damages an adjoining mine belonging to another owner in the same vein." Joinder.

The plaintiffs also new-assigned that they sued not only for the grievances in the third and fifth pleas admitted, but also for similar grievances in respect of water which ran, flowed, and passed by, through and along the said cruts or openings from the said lower strata, respectively, to and into the said other mines of the defendants by means of pumping and drawing the same by the defendants.

The defendants pleaded to the new assignment—first, not guilty—secondly, that the said cruts or openings in the new assignment mentioned were made by them for the purpose of reaching the several lower strata in the earth in the several counts of the declaration mentioned, and of working, getting and winning the mines and minerals of them, the defendants, situate in the said lower strata respectively, and not for any other purpose, and were so made by them according to the usual, proper, and recognized manner and course of mining; that after the same had been so made, the defendants were engaged in working, getting and winning certain parts of the said mines and minerals of them, the defendants, situate in the said lower strata, and were so working, getting and winning the same according to the usual, proper, and recognized manner and course of mining; that, in the course and for the purpose of such last mentioned working, getting, and winning, it became and was necessary for the defendants to pump and drain away the water, in the said new assignment mentioned, from the said last mentioned parts of the said mines and minerals, and the defendants did accordingly pump and drain away the said water; that, by reason of such pumping and draining, the said water ran, flowed, and passed by, through and along the said cruts and openings into certain other parts of the mines of the defendants, that is to say, the several upper strata in the declaration mentioned; and that the said water afterward ran and passed from the said last mentioned mines of the defendants to and into the mines of the plaintiffs, underground, by natural percolation, through the strata of the said last mentioned mines of the defendants and of the plaintiffs respectively, and not otherwise—which were the grievances above newly assigned.

The plaintiffs demurred to the second plea to the new assignment, the ground of demurrer alleged being, "that, although it be a usual, proper, or recognized mode of mining, it will not in law justify pumping foreign water into a vein of mineral, when it damages an adjoining mine, belonging to another owner, in the same vein." Joinder.

JOHN GRAY, Q. C., for the plaintiffs.

Neither of the pleas in question affords any answer to the plaintiffs' complaint. The defendants clearly had no right, by making cruts, to alter the natural flow of the water from their mine, and cause it to flow into the plaintiffs' mine; still less had they a right to do so by raising the water by artificial means from the lower to the upper part of their mine, and thereby increase the natural flow into the mines of the plaintiffs. The general expressions thrown out by the court in *Smith v. Kendrick*, 7 C. B., 515 (E. C. L. R., vol. 62), do not affect this case; nor do the cases of *Acton v. Blundell*, 12 M. & W. 324, or *Chasemore v. Richards*, 2 Hurlst. & N., 168, 7 House of Lords Cases, 349, apply. The Lord Chancellor, in the last mentioned case, puts it very much as TINDAL, C. J., did in giving the judgment of the Exchequer Chamber in *Acton v. Blundell*, where it was held that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a land owner who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first mentioned owner, and lays his well dry. "We think," said the Chief Justice, "the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that, if in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well,

this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which can not become the ground of an action." It is no answer to the plaintiffs' complaint, for the defendants to say that what they have done was done in the usual and ordinary course of good mining.

H. JAMES (with whom was HORACE LLOYD), *contra*. The pleas allege that the defendants have done no more than work their mine according to the usual and approved course of mining in the district. They had an undoubted right to get all the ironstone from their mine, regardless of the natural consequences which might result from their so doing. That is the effect of the judgment of this court in *Smith v. Kendrick*, and of the Exchequer Chamber in *Acton v. Blundell*. The only obligation which the law imposes upon the defendants is, that, in working their mines, they shall not be guilty of negligence, or willfully damage the plaintiffs' mine. [ERLE, C. J. The defendants in working their mine had no right to interfere with the natural flow of the water. If by gravitation it will go away, so be it; but they must not direct it.] The cruts were not made for the purpose of conducting the water in a given course, but for the purpose of getting the ore in the most convenient manner. *Smith v. Kendrick* distinctly lays it down that the rights and duties of one mine owner are wholly independent of the working of his mine by an adjoining owner. In delivering the judgment of the court there, CRESWELL, J., says, 7 C. B. 564 (E. C. L. R. vol. 62): "Treating the question as a new one, not governed by the authority of any decided case—for all those referred to are distinguishable—it would seem to be the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own mine in the manner most convenient and beneficial to himself, and although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." [ERLE, C. J. It can hardly be necessary to say that there is no such thing as a wrong, without pre-supposing a right which has been violated.] There is greater difficulty in the question, undoubtedly, where artificial means are resorted to for the purpose of raising the water to a spot where it would not

otherwise have flowed. But there is no allegation of improper mining here. On the contrary, it is averred by the pleas, and admitted by the demurrers, that what the defendants did was done in the usual and accustomed course of good mining. The substantial causes of complaint alleged in the declaration and in the new assignment, are all answered by the pleas.

GRAY, in reply: As to the flow of water by means of the cruts, it is true that it is alleged that the cruts were made for the more convenient working of the defendants' mine; but enough is not alleged to constitute a defense. [BYLES, J.: The allegation is, that the defendants committed no trespass, and that they did what they did in the usual and proper course of mining.] As to the pumping up the water from the lower level, and so causing it to flow into the plaintiffs' mine, it is distinctly charged in the declaration and new assignment, and not denied or excused by anything that is alleged in any of the pleas. The following authorities were referred to: *The Duke of Beaufort v. Morris*, 6 Hare, 340; Yool on Waste, 136; and Bainbridge on Mines, 436. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:

In this case the plaintiffs complained of the flow of water into their mine from the defendant's mine. The defense was, that the flow arose from mining works carried on with due skill, in a customary and proper manner. As the complaint related to three kinds of foreign water, the questions raised may be better understood by a short description of the local relation of the two properties, which was agreed to be the effect of the pleadings. The two mines adjoined. The defendants' was the upper, the plaintiffs' the lower mine.

In each mine were two seams of ironstone, distant a few fathoms from each other. Each seam cropped out on the surface of the defendants' land, and extended with a parallel dip down through the defendants' land into and through the plaintiffs' land. Each party had worked out the upper of the two seams of ironstone, which we call No. 1; and the plaintiffs had left no barrier to stop back the water flowing down

from the defendants' work in that seam; and of this water the plaintiffs did not complain, it being very clear, from *Smith v. Kendrick*, 7 C. B. 515 (E. C. L. R. vol. 62), that no complaint could be sustained.

In order to get the mineral in the seam which we call No. 2, the defendants made a crut or passage from the first seam to the second seam, so constructed as to be on an incline from a part of the seam No. 2 to a part of the seam No. 1. Although No. 2 lay under No. 1, yet the head of the crut in No. 2 was at a higher level than the mouth of the crut in No. 1. This crut was made in the usual course of skillful mining, for the purpose of getting the minerals.

The defendants' counsel explained it to be for the purpose of conveying minerals from the seam No. 2 down the crut to the seam No. 1, and down that seam to the shaft therein, so as to be raised to the surface. While the crut effected that purpose, at the same time the water from the works in the seam No. 2 flowed down through it into the seam No. 1, and so onward into the plaintiffs' mine.

One complaint of the plaintiffs was of this water; and they contended that they were not obliged to receive through seam No. 1, more water than that which flowed from the works therein, and might maintain their action in respect of the water so flowing from the seam No. 2; but on this point we think that the plaintiffs fail. The owners of the higher mine have a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water which flows by gravitation into an adjoining mine from works so conducted. We think that the law was correctly laid down to that effect in *Smith v. Kendrick*.

✓ If this crut had been made for the purpose of turning water into the plaintiffs' mine which would not otherwise have arrived there, and not for the purpose above described, we consider that the action would lie.

It appears in *Smith v. Kendrick*, where the barrier of the lower mine had been wrongfully pierced for air-holes by a former occupier of the upper mine, that a subsequent occupier of the upper mine had no right to make a construction at his lower boundary for the sole purpose of turning some of

his water through these openings. By paying money into court in an action for that wrong, he admitted that his exemption from liability was confined to the water which flowed by the laws of nature into the plaintiff's mine from works conducted for the purpose of getting minerals.

The plaintiffs further complained of other foreign water which had flowed into their mine. This water is alleged in these pleadings to be raised by pumping to a level trough and to cause such a flowing. The counsel described the pumping to be for the purpose of getting other mineral, lying deeper than the two seams above mentioned; and the pump was so placed that a crut led therefrom to the head of the crut above mentioned, at such a level as that the water from the pump flowed down the two cruts into seam No. 1, and so into the plaintiffs' mine. In respect of this water, we think that the action lies.

The defendants, as occupiers of the higher mine, have no right to be active agents in sending water into the lower mine. The plaintiffs, as occupiers of the lower mine, are subject to no servitude of receiving water conducted by man from the higher mine. Each mine owner has all rights of property in his mine, and, among them, the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine, to bay back the water of his higher neighbor.

The law imposing these regulations for the enjoyment of somewhat conflicting interests, does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine or advantageous to himself.

This appears to us to be the law. For authority, we refer, both to *Smith v. Kendrick*, and also to the question left to the jury in *Acton v. Blundell*, 12 M. & W. 324.

The judgment will therefore be for the plaintiffs on the demurrer to the declaration and to the plea to the new assignment, and for the defendants on the demurrer to the other pleas.

Judgment accordingly.

LEADVILLE MINING CO. V. FITZGERALD ET AL.

STEVENS & LEITER V. MURPHY ET AL.

(United States Circuit Court, District of Colorado, 1879. Carpenter, 73.)

¹ **Lode in place defined.** A vein or lode can not be in place unless it is within the general mass of the mountain. It must be inclosed by the general mass of fixed and immovable rock. If it comes to the surface and passes out from the rock in place, it ceases to be a lode.

² **Following lode beyond side lines.** One who seeks to establish a right to pursue his lode beyond its side lines must be able to show that the lode is continuous and in place throughout its whole course from its origin in his own ground, to the place beyond in which he claims it.

¹ **Departure from the perpendicular.** A vein dipping at any angle between a vertical and a horizontal position has a departure from the perpendicular within the meaning of § 2322 R. S. U. S.

Presumption of ownership in locator. Every locator shall be regarded as the owner of all valuable deposits within his own lines until some one shall show by a fair preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.

¹ **A mass of ore underlying the debris** is not a lode such as may be followed on the dip beyond the surface lines, and the same is true where detached bodies of ore are found on the same "contact;" otherwise, if it be a continuous sheet of ore between defined boundaries of inclosing rock.

Apex on ground of third party—Burden. If the apex of the lode in controversy is upon the claim of one not a party to the suit, the plaintiffs can not recover. The burden is upon the plaintiffs to show that the lode is in their ground, that they have the apex of it, and that it extends in well defined boundaries from their territory into that of the defendants.

There was an application for an injunction in each of the above cases, and both were determined at the same time.

In passing upon the motions the court said:

HALLETT, D. J.

These cases are so far similar that what is said in respect to one may be taken to be applicable to both of them. Until the discovery of mineral deposits near Leadville, no controversy had arisen in this State as to whether a lode or vein is in place within the meaning of the act of Congress. The mines opened in Clear Creek, Gilpin, Boulder and other counties descend into the earth so directly that no question could arise as to

¹ *Stevens v. Williams*, 1 M. R. 557.

² *Iron Silver Co. v. Murphy*, 1 M. R. 548.

whether they were inclosed in the general mass of the country. Whatever the character of the vein and whatever its width, it was sure to be within the general mass of the mountain; but the Leadville deposits were found to be of a different character. In some of them, at least, the ore was found on the surface, or covered only by the superficial mass of slide, *debris*, *detritus* or movable stuff, which is distinguishable from the general mass of the mountain, while others were found beneath an overlying mass of fixed and immovable rock, which could be called a wall as well as that which was found below them. It then became necessary to consider very carefully the meaning of the words, "in place," in the act of Congress, in order to determine whether these deposits were of the character described in that act. Section 2320 of the Revised Statutes, refers to veins and lodes in "rock in place," and of course no other can be brought within the terms of the act. After careful consideration, it was thought that a vein or lode could not be *in place* within the meaning of the act, unless it should be within the general mass of the mountain. It must be inclosed by, or held within the general mass of fixed and immovable rock. It is not enough to find the vein or lode lying on the top of fixed or immovable rock, for that which is top is not within, and that which is without the rock in place can not be said to be within it. This conclusion was reached in the application by the owners of the New Discovery claim against the owners of the Little Chief claim. The same idea was advanced in the trial before a jury, in which the ownership of the Iron mine was involved. The attention of the jury was especially directed to that matter, and they were directed to inquire upon the evidence, whether the lode was inclosed within the general mass of country rock. In other words, whether there was a hanging as well as a foot wall; and the jury ascertained and determined that the lode was so inclosed in the general mass of the mountain. To apply this principle in the present cases, we are led to inquire whether the veins or lodes are so inclosed in the general mass of the mountain, or lie only on the surface of the fixed and immovable rock, with no other covering than the superficial mass to which reference has been made.

In the first of these cases, in which the Leadville Mining

Company is plaintiff, it seems that in the plaintiff's own ground the lode is well enough defined. There, there is an overlying mass of country rock which may be called a hanging wall; but when we come to the ground in dispute, which is claimed by the defendants, and is called by them the Little Giant claim, the testimony is not satisfactory on that point. Only one of the witnesses for plaintiffs has examined the shaft sunk by defendants, and although he testifies that the valuable ore at the bottom of the shaft is found between walls, his testimony is overborne by numerous witnesses on behalf of defendants.

In all the affidavits filed by defendants, which are very numerous, it is stated that the shaft sunk by the defendants penetrated only loose material, and that nothing like solid or fixed and immovable rock was found in its course. In this state of the evidence, it is almost undisputed that what is called a lode or vein at the point in controversy is not within the general mass of country rock. Whatever its character may be to the eastward from that point, if at the very place in controversy the upper or hanging wall can not be found, it can not be called a lode within the meaning of the act. These deposits are very irregular, and, if for any considerable distance they come to the surface and pass out from the rock in place, they cease to be lodes within the meaning of the act.

At all events, the rule must be so as to one who seeks to pursue them beyond the side lines of his claim. To establish a right of that kind, he must be able to show that the lode is continuous and in place throughout its whole course, from its origin in his own ground to the place in which he claims it. In this respect the showing was very different in the case to which reference was made by counsel, between the owners of the Bull's Eye and the Silver Wave claims. In that case many witnesses testified that the vein was continuous and in place throughout its course between the two claims. There may have been some opposing testimony, but it was a contested point, and the testimony went strongly to show that the vein was continuous as alleged in the bill of complaint. But here, the fact that the lode at the point in dispute is upon the top of the rock in place, and covered only by loose material and *debris*, is almost undisputed. Upon that ground, it

is thought that no injunction can be allowed. The plaintiffs must show that the vein is in place and that it extends continuously from their ground and into that claimed by defendants, before they can be entitled to such relief.

In the other case, the question presented is not the same. It is not denied that there is at the place in controversy an overlying mass of country rock, but defendants allege that within the limits of the Iron claim and eastward from that point in the openings made by plaintiffs, there is no continuous vein or lode; that in that territory there are only irregular deposits having no connection with each other. The plaintiffs, on the other hand, contend that there is, in all the ground opened by them, a continuous vein or lode which may be traced throughout all their workings. The point is strongly contested on both sides. Many affidavits have been filed by each party to establish the fact, and it seems to be a question which should be submitted to a jury. Upon principles heretofore announced, we may interfere by injunction to preserve the property pending the controversy. If, as in the other case, it was clearly shown that the fact is as alleged by defendants, the plaintiffs could not be entitled to such relief; but, as they have made a strong showing as to the regularity and continuous course of the vein, it is proper to preserve the property until the result of the trial shall be known.

As to what was said by counsel with reference to the position of the vein or lode, I am still of the opinion, that if it descends from the plane of the horizon it is to be regarded as a departure from the perpendicular. It is conceded that if the vein be exactly upon the plane of the horizon it is not within the act. In every position, however, from the horizontal to the perpendicular, it must be said that it has departed from the perpendicular. And here, if the evidence is to be believed, the lode is somewhat below the plane of the horizon, and so within the meaning of the act, as one which may be pursued beyond the side lines of the claim in which its outcrop may be found.

In the first case the injunction will be denied, and in the second the motion will be allowed.

In the case of the Leadville Company, the plaintiffs took leave to amend their bill, and in the other case the defendants took leave to amend their cross-bill.

Both cases were afterward tried by jury. The charge of HALLETT, D. J., in the case against Murphy,¹ will be found under the title, APEX. In the Leadville Company case, the attorneys were:

HUGH BUTLER, T. M. PATTERSON, C. S. THOMAS and E. O. WOLCOTT, for plaintiffs.

J. B. BELFORD, J. D. WARD and JAMES Y. MARSHALL, for defendants.

HALLETT, D. J. (charging jury).

You have learned, gentlemen, from the evidence, that there is no controversy between these parties as to the surface of their several locations. The plaintiffs claim to own the Carbonate location, as laid down upon the maps, and defendants claim to be the owners of the Little Giant claim, as to the surface of these locations. It may be assumed for the purposes of this controversy, that each party is the owner of their own location as claimed by them. The controversy relates to ground which is reached by a subterraneous course from the plaintiff's ground, and in which they claim that it is their lode, originating in their territorial lines; and they claim to have followed this lode from their own ground into that of defendants, in pursuance of the act of Congress, which gives them, as they say, that right. This act of Congress provides, whenever a location shall be made upon a lode, according to the local law, the locator shall be entitled to the surface ground, to a certain extent, on each side of the top or apex of the lode, and that he shall have not only that lode, but all others which have their tops and apexes in the same territory: that is, in the ground covered by his location, and he shall have these lodes in such a way that he may follow them upon their dip or inclination to any depth to which they may extend.

It has sometimes been contended that the lode must have a certain position in the earth; that is to say, it must be more or less vertical before this rule, which is given in the act of Congress, can be applied; but we have heretofore held, and we are still of the opinion, that it applies to all lodes which have an inclination below the plane of the horizon, whatever it

¹ 1 M. R. 548.

may be; that is to say, whether the lode stands at an angle of twenty, thirty, forty, seventy or eighty degrees, that it is still within the terms of the act of Congress, if it be a lode, and one that may be followed with such boundaries as to enable the locator to identify it beyond his own territory; that whatever its inclination may be below the horizon, that he may follow it. So that to state the point as it may be applied to the present case, the inclination of the lode, if it should be, for instance, twenty or twenty-five degrees below the horizon, it is the same as if it were more; if it originates in the plaintiff's ground and extends into that beyond the territory of the defendants, the plaintiff is entitled to it, although it may have no greater inclination than twenty or twenty-five degrees.

Having stated to you that the controversy relates to the lode beneath the surface, as extended from the territory of the plaintiff's claim into that of the defendants, I have written here what I regard as the practical question for your consideration, as well as directions respecting these questions.

As a starting point in the evidence before you the fact appears to be established, that large quantities of valuable ore have been found in the Carbonate claim. This may be taken to show that a lode exists in that locality in so far as the question relates to the boundaries of that claim. That is to say, if the question for present consideration related to the ownership of ore within the surface limits of the Carbonate claim, it would not be necessary to consider very carefully the position of the ore in the earth. Because within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere. If, however, it is not important to examine the situation of the ore within the lines of the location with reference to the question of ownership, it may be

of some value to consider that subject for the purpose of ascertaining whether there is a lode in that ground extending thence eastward into adjoining territory. Upon that point it may be said that the mineral must be in place within definite boundaries; that it must be practically continuous from the plaintiff's ground into defendants', and that the top and apex of the lode must be in plaintiff's ground. As to the first question, if the lode is in the general mass of the mountain as distinguished from the slide, *debris* or "tumble stuff" of the surface, it is in place within the meaning of the act of Congress. If the rock above the lode is in its original position, although somewhat broken and shattered by the movement of the country or other causes, it is in place. And in this kind of deposits it may be said that the lode is in place wherever the rock above is in place. The occurrence of detached masses of rock, whether called boulders or by some other name, and whether they are of lime or other formation, in proximity to the ore, is not in itself conclusive evidence that the overlying mass of rock is not in place. That fact, if it is a fact, may tend to prove that some or all of the overlying mass is of the same character.

But if there is evidence to show that the overlying mass is not the same, but of original structure, the occurrence of boulders or detached masses of rock with the ore, is not significant. If the principal part of the rock above the mineral is in its original position, according to the present structure of the mountain, the lode is in place, although some masses of rock or boulders may be associated with the ore.

Upon another question, the same circumstance, if it is proven, may be of some weight. And that question is as to the boundaries of the lode. If the ore is found in general within boundaries of porphyry and lime, although some fragments of each may occur with it, the lode is well defined. If, however, the ore occurs in porphyry and lime, or in both or either, in such confused and irregular way as shows no line of demarcation for the ore body, the lode is not so defined as that it may be followed beyond the lines of plaintiff's location. The physical structure of the earth at and within the grounds in controversy and immediately west of the dividing line between the claims in plaintiff's ground, is to be

considered in that view. If it is broken up and jumbled in such a way that from plaintiff's ground over the line and beyond, through defendants' workings, it seems to be unreasonable to say that there are boundaries of porphyry and lime to the mineral body, the plaintiffs can not recover. If there are such boundaries, the evidence is sufficient on that point. Intimately connected with this is the second question before suggested, whether the lode is practically continuous from plaintiff's ground into defendants' ground. Of course, if there is a continuous and unbroken sheet or body of ore extending from one claim into the other, there can be little doubt as to the boundaries. Subject to the explanation already given, relating to the position of the overlying rock, whatever may be above and below such a sheet or ore body may be regarded as walls or boundaries. But if the mineral is not continuous, upon the facts here shown we must look to the matter of boundaries to ascertain whether the lode extends from one claim to another. There may be such interruption in the course of an ore body as to lead to the inference that there can be no connection between the separate parts, although the "contact," as it has been called, may continue from one to the other. But if you find from the evidence that there is a body of ore in plaintiff's ground near to their east line, and there are other bodies of ore in defendants' ground, and that there are well-defined boundaries to both and all, which are the same as to both and all, and such boundaries extend from one to the other, you ought to find that they are parts of the same lode. So that if the mineral is not continuous from one claim to the other, the question turns upon the matter of boundaries, and that is to be decided by the preponderance of testimony. Not the number of witnesses merely, but upon what you may regard as the weight of testimony, after giving due credit to each and all.

These are the important questions. There is another that was referred to in the course of the argument. It is also mentioned in this writing, but I have not commented on it, as to the position of the top or apex of this lode. I have not heard any evidence, which is sufficient to establish the fact that it lies below this claim, to the west of it. You will remember it was contended on the part of the defendants, that

as to this portion of the lode, if there is any within this ground, that as to this portion which extends into the Little Giant ground, that it has its top or apex in the Ætna location, which is immediately west of the Carbonate location, and, upon that hypothesis, that would be owned by the Ætna people; that there was a lode beginning in their ground, having its top there and extending clear across the Carbonate claim, and into the Little Giant claim. That would be a tenable position if there were evidence sufficient to establish the fact, but I do not regard the evidence as of very great weight upon that point, and, therefore, I have not said very much about it. But it is a question for your consideration, and if you find, as a matter of fact, that the top and apex of the lode, or such part of it as is claimed by the plaintiffs against the defendants, that it lies in the Ætna ground, and not in the Carbonate ground, but down to the west of the Carbonate claim, then, of course, the plaintiffs can not recover in this action. Upon that theory or hypothesis, the lode would belong to the Ætna people and not to the plaintiffs in this case.

The matter in controversy here relates only to that portion of the Carbonate claim, or the Carbonate lode, if you find that there is one which extends from the north end down as far as the Shamrock location. The evidence that was given in respect to all the workings below that point, or southward from that point, is only to show the character of the deposit, to show what it is generally, and how it was found in all that territory. It is sufficient to say, if you find the issue for the plaintiffs that it is the owner in fee, so far as the claims adjoin each other.

As to the question of damages, if you find for the plaintiff, there is some evidence here tending to show that a certain amount of ore was taken from this ground; that is, from the territory covered by the Little Giant location; if you find for the plaintiffs they are entitled to the value of that ore whatever it may be. You will, perhaps, remember better than I, the testimony. I believe that there is some evidence to show that something like \$2,000 was taken out or something of that kind.

I do not think of anything more that may be necessary to say to you, gentlemen, except that the burden of proof is

upon the plaintiffs—that it rests with them, as they are holding the affirmative in this action, to show by a preponderance of testimony every fact which is necessary to support a finding in their favor; that is to say, that there is a lode in their ground, and that they have the top or apex of it, and that it extends in well defined boundaries from their territory into that of the defendants. It is upon them to prove it by a preponderance of evidence. If you find the testimony to be evenly balanced your verdict will be for the defendants; if there is a preponderance of testimony for the plaintiffs, it will be for the plaintiffs, of course.

The jury returned a verdict for the defendants.

1. A patent or location carries the lode with its dip. *Wolfley v. Lebanon Co.* 4 Colo. 112; *Post SIDE LINES; Mining Co. v. Tarbet*, 98 U. S. 463; *Post LODE*.

2. Nearly all ledges diverge from the perpendicular—and sometimes change their dip: These incidents considered with reference to ledge sold separate from its hoisting works. *Bullion Co. v. Croesus Co.* 2 Nev. 169; *Post EJECTMENT*.

3. Lode can not be followed on the dip beyond its end lines. *Eureka Co. v. Richmond Co.* 4 Saw. 303; *Post LODE*.

THE GOLDEN TERRA MINING CO. v. MAHLER ET AL.

(4 Pacific Coast Law Journal, 405. District Court, Dakota, 1879.)

¹ **Veins can only be discovered on public lands.** If two locations of mining claims are made by the same party which interfere with each other, the second location includes only so much ground as is exclusive of the first, and if the discovery of the second is within the boundaries of the first location, then such second location is invalid, for it is a condition precedent to the location of a mining claim, that a discovery of a vein, bearing valuable minerals, shall first be made within the limits of such location, independent of any other subsisting and valid location. It is upon the public mining lands that the vein must first be discovered.

² **Discovery after location made.** But if such party afterward discovers a vein upon that portion of the second location which is exclusive of the first, the staking, recording and improving will inure to his benefit, and the validity of the location will date from the time of such discovery. The order of the acts to be performed is non-essential, provided no intervening rights of others have accrued.

Pay ore not essential to discovery. A vein is discovered when there is disclosed a well-defined body of rock in place, carrying gold, which body afterward proves to be continuous, and it is not essential that it should carry pay ore.

³ **Estoppel—Abandonment.** A applied to B to know if there was any mining ground in the vicinity which was vacant, and upon which he would be likely to find ore. B pointed out certain ground, stating that it was vacant and that A could locate and appropriate it to his own use. A thereupon located and worked the ground until it became valuable, when C, to whom B had afterward granted, claimed the premises under a location which B had previously made but concealed from A. *Held*, that every element essential to constitute an equitable estoppel sufficient to operate as a transfer of the title from C, if he possessed it, is here present; but that the case is more in the nature of an abandonment of the property by B.

A. M. HILLHOUSE, CORSON & THOMAS, CLAGETT & DIXON, ATWOOD & ROMANS, for plaintiff.

McLAUGHLIN & STEELE and HARRY I. THORNTON, for defendants.

By the Court, MOODY, J.

In addition to the formal findings of fact and conclusions

¹ *Armstrong v. Mower*, 6 Colo. 393, 581.

² *Jupiter Co. v. Bodie Co.* 4 M. R. 411. *North Noonday Co. v. Orient Co.* 6 Saw. 299; *Post LOCATION*; *Zollars v. Evans*, 4 M. R. 407.

³ *Patterson v. Hitchcock*, 3 Colo. 533; *Post ESTOPPEL*.

of law filed in this case, I have deemed it not unadvisable to present my views of some of the more important questions, both of fact and law, involved, somewhat more at length than is necessary or appropriate in such formal findings. The absorbing character of my official duties since the trial has precluded an earlier determination of this case. Counsel are aware that until the fire in Deadwood, which occurred on the 26th of September, I was daily, constantly, engaged in the trial of causes in this and in the United States Court at Rapid, many of them of importance, requiring my whole attention, and that since the fire the time that I could devote to any one case has been very limited. I desired that my decision should at least be the result of mature consideration, both because of the importance of the particular case, and of the novelty of some of the questions involved.

The action was tried in July at the February additional term of this court, and consumed nearly four weeks, the testimony taken covering more than five thousand pages. I had the benefit of the learning and ability, not only of the experienced local counsel engaged, but also of able and distinguished gentlemen from the States of California and Nevada, whose large and varied experience in mining litigation rendered them capable of affording me great assistance.

This action is brought by the Golden Terra Mining Company, a corporation organized under the laws of California, transacting business and holding property in this Territory, against the defendants, Alfred J. C. Mahler and others, to recover about two hundred by one hundred and fifty feet of what is known as the Golden Terra Extension mining claim, the plaintiff claiming by virtue of its ownership of what is known as the Ophir mining claim, which overlaps and includes a part of the Golden Terra Extension. The suit is in the nature of an action to quiet the title, and for an injunction. The defendants are engaged in working the ore at the upper level, and the plaintiff is engaged in working the ore from the same vein or ledge at a lower level. The answer of the defendants, besides being a specific denial of the allegations in the complaint, also contains affirmative allegations and a prayer for affirmative relief.

It is unnecessary to state the issues in this decision, as the

facts recited will be sufficient to illustrate the questions I am required to pass upon.

The first question I propose to consider arises upon the following facts, which are substantially undisputed: On the 21st day of February, 1876, Fred Manuel, C. X. Harris and Alex. Engh, citizens of the United States, and otherwise qualified thereunto, on Bobtail Gulch, in what afterward became the Whitewood Quartz Mining District, in Lawrence county, discovered a lode or vein of gold-bearing quartz rock in place, and proceeded to locate the same under the mineral land laws of the United States.

They located, claimed and staked a parcel of land embracing the discovery, seven hundred and fifty feet north-westerly, seven hundred and fifty feet south-easterly, and one hundred and fifty feet each side from the point of discovery—and named their claim the Golden Terra Lode. The locators in all respects conformed to, and complied with, the laws of the United States, of the Territory and the local rules and regulations governing the possessory rights to such mining claims, and they and their grantees have at all times since been in the actual, peaceable possession of said Golden Terra mining claim, claiming it under and by virtue of such original location, and at no time has there been any abandonment of such location, actual or intended, or of any portion thereof (save a few feet on the southerly end when, upon a survey, it was found they had more than fifteen hundred feet in length included within the boundary stakes); but all the time from the first location to the commencement of this action, the said Golden Terra mining claim has been a valid and subsisting location, so far as it could be made such, under the laws of Congress.

Subsequent to the 21st day of February, 1876, and prior to the 7th day of June, 1876, the said C. X. Harris sold and transferred to Moses Manuel and H. C. Harney all his right and interest in the said Golden Terra mining claim, and they, Fred. Manuel, Moses Manuel, H. C. Harney and Alex. Engh, became and were the owners of said claim, and in the actual possession thereof, claiming the same for their own.

On the 7th day of June, 1876, while they were in the possession, and claiming the Golden Terra mining claim, Harney,

Engl and the Manuels made what, at that time, they supposed was a discovery of another vein or lode of gold-bearing quartz rock in place, about three hundred and fifty feet southerly from the first discovery, and within the limits of what was then, and has ever since been claimed by them and their successors in interest as the Golden Terra mining claim. Subsequent developments have determined beyond doubt, that such supposed new discovery was upon the same vein and body of ore as the first, and upon which the Terra location had been predicated. Upon the making of such supposed new discovery, without abandoning or intending to abandon any portion of the Golden Terra location, the parties put up a discovery notice, claiming seven hundred and fifty feet north-westerly, seven hundred and fifty feet south-easterly and one hundred and fifty feet on each side from the point of discovery, and otherwise conformed to and complied with the laws of Congress and the local laws, rules and regulations governing possessory titles to such mineral lands.

This second location they named the Ophir. It will be seen by an examination of the plats on file in this case, that the Ophir is nearly all included within the exterior boundaries of the Golden Terra claim, leaving outside of such boundaries a strip along the westerly side of the Terra, about sixty feet by eleven hundred and fifty feet, and upon the south and southwest a parcel of about three hundred by three hundred and fifty feet.

It is with regard to a part of this last named parcel extending beyond the southerly end line of the Golden Terra, that this controversy has arisen. No other discovery and no discovery of a vein in the Ophir, outside of the limits of the Golden Terra, was made, and no work was done or improvements made, until after the defendants' rights had accrued.

On the 27th day of January, 1877, the locators and owners of the Golden Terra and Ophir sold and transferred their rights and interests therein to Thomas F. Durbin and John W. Bailey, by deed, describing them in this manner: "A certain gold-bearing lode lying and being between the north fork of Gold-run and Deadwood Creek, and crossing Bobtail Gulch on placer claim number fourteen (14), and known as the Golden Terra Lode, as the same appears on the records in the

office of the Recorder of the Whitewood Quartz Mining District. Also a certain gold-bearing lode running parallel to and about one hundred feet from and south-west of the aforesaid Golden Terra Lode, as appears of record in the Recorder's office aforesaid.

I have given this description at length, because, while it is very indefinite as to the Ophir, I have admitted against defendant's objection and considered evidence tending to show it was the Ophir that was intended to be conveyed in this instrument, and treat it as a conveyance of the Ophir, and because I propose to consider further along the effect of such description. For the purpose of further enforcing the view I have taken, that at no time was there an abandonment, or intended abandonment, of the Golden Terra location, or any portion of it, or that any portion of it was intended to be included within the Ophir, I add, the above named grantees, Bailey and Durbin, in June and July, 1877, after they had purchased, caused a survey of the Ophir to be made, and in that survey caused the exterior lines of the Ophir to be run only to the lines of the Golden Terra, thus actually excluding in that survey any part of the Golden Terra.

I have, I think, stated sufficient facts to present the question which meets us at the threshold of this case: Can a legal and valid location be made, predicated upon a discovery of the existence of the same vein already discovered at another place within the limits of a valid and subsisting location, without an abandonment of any portion of such subsisting location? It is urged by the defendant's counsel, that inasmuch as the Ophir discovery was within the limits of the Golden Terra mining claim and upon the same vein, and the attempted location was made by the then owners of the Golden Terra, without abandonment of any portion of the first location at that time, or since, that such alleged discovery was not a discovery of a vein at all, but a mere development of one already discovered, and that a location predicated thereon gave them no additional rights; a further argument urged being, that to hold such a location valid would, in effect, be nullifying the act of Congress limiting mining claims to fifteen hundred feet along the vein or lode, and to such width not less than twenty-five feet, nor more than three hundred feet on either

side of the middle of the vein, as the local laws, rules and regulations should provide, and would allow parties to make locations indefinite in length and width, predicated upon what is practically one discovery.

It is as confidently urged by the plaintiff's counsel, that inasmuch as the law of Congress does not limit the number of claims which any person or a number of persons may take on any lode, or in any district, that it is competent to base as many locations upon one discovery, or upon any number of discoveries, within an already subsisting location, as may be desired, the only condition being the compliance otherwise with the law in marking the surface boundaries, doing the requisite amount of work, etc.

Which of these propositions is the correct one?

Is there anything in the law of Congress or the local laws, rules, or regulations, preventing as many valid locations being made as a party may desire, predicated upon one discovery or several discoveries, so called, of the same vein, within the limits of the first and yet subsisting location, and this without abandonment, actual or intended, at the time, or subsequent, of the first location?

It was after much hesitancy that I was able to come to a conclusion satisfactory to myself upon this question, and after careful consideration and thought. Plausible and at first view almost conclusive reasons can be, and upon the argument were, urged upon either side. Counsel were unable to call my attention to a single adjudicated case or opinion, from any source, that could serve as a precedent, or even as an illustration. It would seem that, if there was anything in the proposition, it should have been the subject of judicial examination somewhere, but I was assured that the litigation in the older mining districts of the country arising upon the validity of mining locations was with regard to locations made prior to the acts of Congress of 1872, and of course no such question would be likely to arise under the former laws, or under the local rules and regulations in force before there was any law of Congress upon the subject.

Before addressing myself to this question, I desire to call attention to some further facts which appeared in the evidence, which may serve to illustrate the reason for this anom-

aly in the making of mining locations, as this certainly was. It appeared from the evidence that the parties making the location of the Ophir were conversant with the law as it stood prior to 1872, allowing the location of but one vein, and surface ground sufficient for the convenient working of the same, in the same location, and did not understand their Golden Terra location would include and give them title to all other veins, the top or apex of which lay within the side lines of their Golden Terra claim, as would be the case by the law of 1872; hence they made this location of the Ophir, supposing it to be a parallel vein, for the protection, as they termed it, of their Golden Terra vein. This is further shown and enforced by the description contained in the deed to Durbin and Bailey, wherein, after describing the Golden Terra as a lode and not as a location or mining claim, and its situation, they add, "also a certain gold-bearing lode, running parallel to and about one hundred feet from and south-west of the aforesaid Golden Terra Lode." These descriptions and their actions in thus locating the Ophir were perfectly consistent with the laws relating to similar locations in force prior to 1872. But the Ophir claim did not run parallel to and about one hundred feet from the Golden Terra mining claim. Parts of both were included in the same boundaries and the rest adjoined. Probably the locators were old miners or had learned from old miners conversant with the former laws, but not with the present. However, I propose to consider this question from the standpoint of the legal effect of their acts, and not from what may have been the intention or inferred intention of the parties.

In determining the validity or invalidity of a location made under the circumstances of the Ophir, in view of the law as it was at the time of these locations of the Golden Terra and Ophir, I have first to determine, what lands and property does the second location give the party the possessory right to? I use the term lands, for in the law of 1872, incorporated into the U. S. Revised Statutes, it is the land containing valuable mineral deposits that is subject to occupation and purchase, it is the land to which the title is acquired by the proceedings specified in section 2325. What does such a location as the Ophir include? After as much thought as I

have been able to give to this case, I have concluded to hold, and do hold, that it includes only so much of the described claim as is exclusive of the Golden Terra exterior boundaries. Two valid and subsisting, perfect and complete locations can not exist, covering the same ground at the same time. While the first exists, all the rights possible for the party to acquire, under the law, he already possesses by the first location. The second can not give him any other or additional rights. His title to that portion of the first, included in the second location is in no way strengthened by such second location so long as the first exists complete in itself.

Let me illustrate: Supposing, instead of the possessory title inuring to him by virtue of his own acts, under the law, as it now does, the title, both possessory and otherwise, came to the locator by deed from the government, and the taking effect of the grant was the inception of the title, would a second deed give him any additional title or right?

Supposing these locators had received from the United States a patent to the Golden Terra mining claim, and afterward to the Ophir, would the patent, granting that portion of the Ophir included within the Golden Terra, have given them any further or higher title? Manifestly not. Such portion of the second grant would have been simply an idle act, a void grant, for the United States would have had therein nothing to convey. Their having acquired by the first location all the possessory rights which the law could give them to the land, and mineral deposits therein, included within the limits of the Golden Terra mining claim, by the second location, including a portion of the first, these locators acquired no further rights to that portion included within the first. Therefore I think the legal effect of the Ophir location was to include no more of the lands and mineral deposits therein than was included within the exterior limits of that location, outside of the exterior boundaries of the Golden Terra mining claim.

Having arrived at that conclusion, I am further of the opinion and so hold, that the spirit and intent of the act of Congress is to require as a condition precedent to a location of a mining claim, that a discovery of a vein, bearing valuable minerals, shall first be made within the limits of such

location, independent of any other subsisting and valid location. It is the unappropriated public lands, the lands belonging to the United States, in which valuable mineral deposits are found, that are open to exploration, occupation, and purchase. It is upon such lands mining claims can be located, and in such lands a vein must be first discovered.

Again, the maximum area of a mining claim is fixed by the law of Congress at fifteen hundred feet along the vein or lode, and six hundred feet in width, subject to a lesser limit, to be fixed by the local laws, not less than fifty feet in width. If one discovery can serve to authorize locations of claims indefinitely, a complete circle of claims may be predicated upon it, encircling it like the spokes of a wheel running from the hub, and thus a claim be made to extend in fact nearly three thousand feet in diameter, by simply adding a few names and stakes and notices, and expending more money for labor and improvements; for if one discovery, which is included within all the locations, will suffice, labor and improvements at one place thus included, will also suffice. If two or more assumed discoveries within the same original location, and upon the same vein, will authorize two or more locations to include additional grounds, it follows logically that one will do equally as well. If such is the construction of the act of Congress to thus allow indefinitely locations based upon one or more discoveries in the same original location, then it opens the door to one of the very evils the law was intended to remedy, to wit, such a monopoly of the public mineral lands by prospectors and speculators as would tend to prevent their speedy and effective development. One person could, by a single shaft at one place, prevent the lands being explored or developed for an area of 3,000 feet in diameter, and the minerals therein contained from being extracted and added to the wealth of the country. I repeat, I think the spirit and intent of the law of Congress is to require a discovery of a vein of valuable mineral-bearing rock in each independent located claim. A contrary view would, in my judgment, be against the policy of the law, which was evidently framed to encourage the rapid development of the mineral resources of the country, not only by giving to the prospector and the miner an opportunity to acquire a title to

the valuable property in the search for, and discovery of which he has expended his strength and his money, but also that such developments should not be retarded by allowing a fortunate few to monopolize large tracts of such lands with the expenditure of slight effort.

The valuable mineral deposits seldom exist in large areas, and the limit given—to wit, 1,500 feet in length, and 600 feet in width—is large enough for one claim, all will admit; indeed, the miner, in the exercise of the quasi-legislative power conferred upon him, usually makes it much less.

It is claimed, further, by defendants' counsel, and I indorse it as having much reason, that the sinking of a shaft disclosing the existence of the same vein at another place in the same mining claim, as in the case at bar, is not a discovery of a vein within the meaning and intent of the act of Congress, but a mere development of a vein already discovered.

But it is urged by plaintiff's counsel that, conceding that no discovery of a vein was made in the Ophir claim at the time of its attempted location in June, 1876, still that such discovery was made therein prior to any discovery of a vein within the defendants' mining claim, the Golden Terra Extension; and they say in substance, that while the want of a discovery would give plaintiff's grantors no rights until such discovery was made, the very moment it was made the inception of the title would take place, and what they had done before in the way of staking, recording, improving, etc., still existing, would inure to their benefit as though done at and subsequent to the time of the discovery, and the validity of the location would date from the time of such discovery.

I think the proposition thus presented is sound law. The order of the acts to be performed is non-essential, providing no intervening rights of others have accrued. I then have to determine when the discovery of the vein did occur within these respective locations. It is claimed by the defendants that the discovery of the vein in the Golden Terra Extension was made in what is known as the discovery shaft therein, on the 20th day of August, 1876. It is conceded, and admits of no doubt, that no discovery of a vein was made in the Ophir, outside of the Terra limits, until long

after the 20th of August, 1876. Indeed, there was no such discovery therein until the developments and underground workings in the Golden Terra were carried into the Ophir, some time in 1878; for while it is claimed that in the upper workings of the Terra, westerly of the Ophir discovery shaft, carried beyond the side-line of the Terra, a vein was disclosed in the Ophir, still I am of the opinion from the evidence, and so find, that the top or apex of that vein was within the side-lines of the Terra, and that, therefore, no discovery could be predicated upon such Golden Terra workings. It is denied by plaintiff that any discovery of a vein, within the meaning of the act of Congress, was made in the discovery shaft of the Golden Terra Extension, and it is claimed by them that such discovery was not made until the tunnel which intersects the bottom of the discovery shaft had reached a point on its course into the mountains some distance west of the shaft, and some time late in 1877 or in 1878.

This involves the inquiry, what constitutes a discovery of a vein of mineral-bearing rock in place, within the meaning of the act of Congress making it a condition precedent to a valid location? Much, and very interesting and valuable testimony has been adduced upon this subject, relating to this particular case. Many experts have been produced and have testified to the result of their careful examinations. Gentlemen of recognized ability and candor, scientifically educated in this special line, and practical miners, have given us the benefit of their learning and experience. Specimens of the material found in the discovery shaft of the Golden Terra Extension have been produced in court for the inspection of the court and counsel. All of the witnesses, I believe, without exception, have testified to the presence of some gold in the rock taken from the discovery shaft. Some testify to having, by their experiments, found several dollars in gold to the ton of rock. Some, to only a few cents or only a trace of gold. The line of distinction seems to be this: The plaintiff by its witnesses endeavors to show that the shaft was wholly in what they term the country rock—that is, in slate—and that what gold was found was in comparatively small quantities, in small seams or stringers of quartz, irregularly interspersed through the slate, and that the vein was first discovered

some distance west or beyond the shaft from the mouth of the tunnel. And I believe most of the plaintiff's witnesses pronounced the vein as commencing where the pay ore commenced; that is, in what they regarded as pay ore from the present standpoint of the expense of mining and milling. While the defendants' witnesses as confidently testified that the vein commenced east of the shaft and intersected it in its upward incline, running through the shaft to nearly the cap rock; that the vein did not commence at what was now pay ore, but where the line of impregnation with gold commenced, and where there was a marked distinction in the character and strata of the rock.

I am inclined to adopt, and do adopt, the rule of the practical miner and prospector, that the vein is discovered when there is disclosed a well-defined body of rock in place carrying gold, which body afterward proves to be continuous. In this district, as is well known and as was shown upon the trial, it frequently occurs that the only line of demarcation between the surrounding country and the vein or body of ore is where the rock begins to bear gold. The slate, or country rock, itself, frequently carries gold, and is successfully and practically and profitably worked as ore. In the bodies of ore, are frequently found masses of material differing from the great part of the ore proper, and which is more or less mineralized, some of which is milled and some of which is thrown away as waste. Frequently and notably so in this vein, a part of which is in controversy, there is no regular well defined and easily distinguished wall-rock as is found in some other mineral districts; a selvage along the wall-rock is of rare occurrence, if any exists at all anywhere.

I can not adopt the rule that the vein must be deemed that part which contains pay ore. The term pay ore is a relative term. What does not now pay the expense of mining and milling, what is waste to-day may, with cheapened transportation, material, and subsistence of operatives, to-morrow be pay ore.

I have found, and do determine, that a discovery of the vein in the defendants' mining claim, known as the Golden Terra Extension, was made by the locators on the 20th day of August, 1876.

I have further found that the locators otherwise fully complied with the laws of Congress and the local laws, rules, and regulations, to entitle them to the exclusive possession of the said Golden Terra Extension mining claim, and that by regular transfer the title and possession have come to these defendants.

Having arrived at the foregoing conclusions, I might with eminent propriety discontinue further consideration of the case, if I was reviewing it upon a question of law, as in an appellate tribunal, as I regard such conclusions decisive of the action; but, I am trying in this court the facts as well as determining the law applicable thereto, and parties have a right, so far as the decision technically is concerned—that is, the findings of fact and conclusions of law—to require the court to pass upon all the questions involved which are embraced within the issues; therefore I deem it proper to give my reasons for the conclusions I have arrived at upon the other principal questions in the case.

The next important question in the order I have adopted arises upon the alleged estoppel, plead by defendants; the facts concerning which I have found, and may be briefly stated, as follows:

Subsequent to the 7th of June, 1876, the date of the attempted location of the Ophir, and some time in July, 1876, William Storey, the grantor of the defendants, except Mahler, sought to prospect upon ground lying west of the Golden Terra. The owners of the Golden Terra and Ophir thereupon requested him to desist from such prospecting, claiming the ground as their own, which he did. A few days afterward Storey and the defendant Mahler, were at the Golden Terra location, and upon inquiry of the then owners of the Golden Terra and Ophir, if they knew of any ground in the vicinity which was vacant, and upon which they would be likely to find a vein of gold-bearing ore, and upon which they could make a location, one of such owners, with the knowledge and consent of the others, went with Storey and Mahler to the south end of the Golden Terra and pointed out this very ground in dispute, and told them *there* was vacant ground where they would be likely to find ore, which ground they could locate and appropriate to their own use; and at

that time this one of the owners, and subsequently the others of them, expressed a desire that they should find a good vein of ore at that place, as it would prove the extension of their Golden Terra vein, and show it to be continuous, and would thereby enhance the value of their property, the Golden Terra vein.

Immediately after having the ground thus pointed out to them by the then owners of the Terra and Ophir, and being induced thereby, and being wholly unacquainted with the fact of any existing claim such claimants might have to the ground thus pointed out, and being thrown off their guard by their conduct, so far as a search of the records and an examination of the ground for stakes or other evidences of appropriation were concerned, the said Storey and Mahler proceeded to work thereon, expended a considerable amount of labor and money in prospecting and in development of the ground, and subsequently made a discovery of the vein of ore which is now in controversy, and thereafter they and their grantees, these defendants, prosecuted the work of development by running a tunnel over a hundred feet into the mountain, such expenditure amounting to more than one thousand dollars, before any intimations of a controversy over the ground came to the knowledge of said Storey and Mahler or their grantees. During all this time, while the owners of the Golden Terra extension were expending their labor and money thereon, the then owners of the Golden Terra and Ophir were frequently upon the ground, saw the work as it progressed, knew they claimed the ground, and had staked it as their own; indeed, one of such owners of the Golden Terra and Ophir assisted in the staking, and all expressed gratification that the Golden Terra Extension owners had met with success in finding such a good vein of ore; both because they were pleased to see the Golden Terra Extension owners prosper, and because it would enhance the value of their Golden Terra mine; and at no time, by word or deed, did they express or manifest any dissent from or objection to the Golden Terra Extension owners thus proceeding, or to their claim of ownership to the property. I am satisfied from the proof that the first claim made to such disputed ground, after Storey and Mahler took possession, came not from the locators

of the Ophir, but from their grantees long after the original locators had ceased to have any interest therein. It is manifest, further, from the fact of their so readily ceasing to prospect west of the Golden Terra, when requested so to do by its owners, and from other facts appearing, that these locators of the Golden Terra Extension would not have attempted work upon such Extension—would not have made any claim thereto, and would not have interfered in any way with any rights or supposed rights of the locators of the Ophir, had they not been thus induced by the representations so made to them, that the ground was vacant and they were at liberty to claim it for themselves.

If these former claimants of the Ophir now, through their grantee, can be permitted to assert a title which they thus disclaimed, it would be a reproach to the administration of justice. It must be presumed, and it does satisfactorily appear, they knew the true state of their own title. Every element essential to constitute an equitable estoppel, sufficient to operate as a transfer of the title from them, if they had possessed it, is here present. I do not, however, regard this as the ordinary application of the doctrine of estoppel. That principle is frequently invoked to prevent the recovery of real property when its enforcement operates to transfer the title legally in one person to the other. In cases of that character, its operation is to disregard the statute of frauds, and make the transfer of realty possible, without the formalities required by law. In this case, the locators of the Ophir, if they had all that is now claimed for them, had only the possessory right, which they could abandon at any time. They could, at their own option, become divested of their property therein, by simple non-user and failure to comply with the conditions under which they held it. No disclaimer by them of the title would operate to transfer any rights of property from them to any one else. The principles of equity and good conscience thus involved would in no way operate to give these defendants the benefit of any title acquired by the locators of the Ophir. No non-user and non-compliance with the conditions of their possessory rights would thus operate; all the effect possible would be simply to relegate the property back to its former condition before they were connected with it; to re-

mand it back to the great body of the unclaimed mineral lands of the United States, and make it possible for these defendants to obtain the title from the United States. The defendants do not claim under the plaintiff's grantors, nor through them, nor are they in any way, directly or remotely, connected with any title or possessory rights which they held.

Therefore, I regard the case as more in the nature of an abandonment by the plaintiff's grantors; and this equitable principle, if applied, operates to prevent them and their successors in interest from now claiming a possession which they induced the defendants to believe they had abandoned.

However, I do not need to apply in this case a less stringent rule than is usually applied when the principles of an equitable estoppel are invoked. The facts are sufficient, and the plaintiff, if it could otherwise establish its title, can not now be permitted to assert any claim or right of possession to the ground in dispute, derived solely from the original locators of the Ophir.

Location on Indian Reservation.

I have thus far considered this case without reference to the fact that until the ratification of the treaty with the Sioux Indians, February 28, 1877, the district of country in which the property, the subject of this litigation, is situated, was a part of what is known as the Great Sioux Indian Reservation. The effect of the existence of that reservation was a subject of discussion upon the trial, although I do not understand that either party cared particularly to press it upon the attention of the court; for it was manifest that if it was decided to have any bearing upon the case, both parties would alike be affected by it; in any event that the plaintiff could reap no benefit therefrom. I do not desire to determine a question of so much moment to many of those enterprising and hardy pioneers who came to this then uninhabited district in an early day, pushing the Indian from a land useless to him, but rich in everything that is the foundation of the white man's wealth, and who sought to acquire by their honest labors valuable properties, unless I am necessarily compelled to do so; and more especially as I hope the present session of the Congress of the United States will, by its enactments, settle all doubts upon the subject. I do not deem it necessary in the determination of this case to pass upon that question. I am

not unmindful of the fact that if it shall finally be held that the existence of that reservation had the effect to exclude, by law, persons from the exploration, occupation and purchase of the mineral lands within its limits, and that no white man, save such as is specified in the treaty, could lawfully go there for any purpose, that then the plea of estoppel will be useless and of no avail to the defendant. All would have been alike trespassers—violators of the law; and no rights could have been acquired, and no title had its inception, until the taking effect of such treaty ceding the reservation.

I have found as facts in this case that at the time of the taking effect of such treaty, on the 28th day of February, 1877, the defendants, and those from whom they claim, were in the actual, peaceable and exclusive possession of the disputed property; that a vein had been discovered therein; that the existing laws, rules and regulations, including the proper recording with the Register of Deeds of the county, after its organization, had then been or were in due time thereafter complied with. Therefore I hold it to be immaterial, so far as the plaintiff's right of recovery is concerned, whether the original locations were affected by the existence of such reservation or not. In no view of the case is the plaintiff entitled to recover.

Other questions of minor importance are in the case, which I do not deem it necessary to consider farther than appears in the finding, as in the views I have expressed they do not affect the result.

For the purpose of an appeal I find the value of the property in controversy to exceed one hundred thousand dollars, it being so stipulated by the parties. Let judgment be entered for the defendants.

[The foregoing, together with the findings of fact and conclusions of law, constitute my decision in the case, to the end that whatever of findings and conclusions are contained in this, not included within the formal findings, the parties may have the benefit of and have incorporated into the record, that it may serve them upon the appeal. I have adopted, with such modifications as I deemed necessary, the findings and conclusions prepared by defendants' counsel by direction of the court, given at the conclusion of the trial.]

JOHN W. ZOLLARS AND THE HIGHLAND CHIEF CONSOLIDATED MINING CO. V. EVANS.

(2 McCrary, 39. U. S. Circuit Court, District of Colorado, 1880.)

- ¹ **Requisites to give title to mining claim.** On the public domain, a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of 1,500 feet in length, and 300 feet in width, he must prove a lode extending throughout the claim.
- ² **Ejectment—What necessary to maintain for mining claims—Burden of proof.** To maintain an action of ejectment for a mining claim, the plaintiff must establish not only that he is in possession, but that a lode had been discovered on the claim prior to the commencement of action and that such lode so discovered extends from the discovery shaft to the ground for which he sues. These are facts to be determined by the jury, from a preponderance of the evidence. As to them, the burden is on the plaintiff.
- ³ **Discovery of mineral, though made after location, will avail against strangers.** Though the locators of a mining claim may not, at the time of the location and survey of the claim, have sunk their shaft to the discovery of mineral in place, yet, if they shall thereafter so sink the shaft and find the lode, they will hold as against all who had not theretofore acquired an interest in the lode—the discovery relating back to the location.

D. P. DYER and C. I. THOMPSON, for plaintiffs.

S. P. ROSE and WELLS, SMITH & MACON, for defendant.

Charge to the jury—HALLETT, District Judge.

The ground in controversy is claimed by plaintiffs as part of the Highland Mary location. You have observed that it is but a small part of that location lying at some distance from the discovery shaft, probably six hundred or seven hundred feet. It is the land embraced within the lines of plaintiffs' and defendant's claims, or the space covered by both claims.

It is stated by counsel, and perhaps it appears in evidence, that plaintiffs have another title to the same ground, based on the Highland Chief location, but they have not set up that title in their pleadings, and they can not rely on it in this action. The only right in them which can be recognized here is that which may arise from the Highland Mary location,

¹ *Lebanon Co. v. Cons. Republican Co.*, 6 Colo. 372.

² *Contra; Anderson v. Lower*, 6 Colo. 393, 581.

³ *Golden Terra Co. v. Mahler*, 4 M. R. 390; *Jupiter Co. v. Bodie Co.*, 4 M. R. 412; *North Noonday Co. v. Orient Co.*, 6 Saw. 300; *Post LOCATION*.

and the investigation before you has been confined to that subject. It is not necessary to discuss at length the validity of the Highland Mary location. It is enough to say that the plaintiffs have not shown any right or title to the premises in controversy, of date earlier than July 30, 1879; and their right at that time is to be determined upon several facts now to be stated.

In the first place, did the plaintiff corporation, the Highland Chief Consolidated Mining Company, on that day or afterward, and before the 23d day of September, 1879, take possession of the Highland Mary claim under deed from Jed. H. Bascom and others, and hold possession thereof at the last named date?

The 23d day of September, 1879, is the time the suit was brought, and in the attitude of the case on the evidence, the plaintiffs can not recover, except upon actual possession at that time. There is nothing to show that John W. Zollars, who assumes the position of trustee to the corporation, was ever in actual possession of the property. The company appears to have been organized on the 30th day of July, 1879, and, of course, not being in existence, it could not enter into possession before that day.

So that, as to possession, the question is whether after the 30th of July, and at any time before the 23d of September, 1879, and at the last mentioned date the corporation was in possession.

If you find that to be true, a further question will arise as to whether a lode was discovered in the Highland Mary discovery shaft, and such lode extends from that discovery shaft to the ground in controversy. On the public domain of the United States, a miner may hold the place in which he may be working against all others having no better right. But, when he asserts title to a full claim of 1,500 feet in length, and 300 feet in width, he must prove a lode extending throughout the claim. I do not recall any evidence to show that any of the openings in the ground in controversy were made prior to September 23, 1879.

The Highland Chief people had sunk a shaft just outside of the ground in dispute, and in May of this year drifts had been run from that shaft into the ground in dispute. But I do not remember that any witness stated when those drifts

were run or when the tunnel which penetrates this territory was made.

And if, in fact, those openings, or any of them, were made before the suit was brought, and the plaintiff corporation was then in possession of them, that fact alone would not enable the plaintiffs to recover *the whole* of the disputed territory.

Such possession of those openings only, without the discovery of a lode in the discovery shaft which extends from thence to the ground in dispute, would not be available beyond the extent of the openings.

And the plaintiffs have not asked for less than the whole territory in dispute, so that you are advised that, in addition to possession in the plaintiff corporation on September 23d, 1879, it must appear from the evidence that a lode was discovered in the discovery shaft of the Highland Mary claim, and that such lode extends from that point to the territory in controversy.

On these points no remarks from the court are needed; but I call your attention to one matter having some bearing upon the question whether the lode, assuming that there is one in the Highland Mary discovery shaft, extends from that point to the ground in dispute. There is some question whether the mineral found in the Highland Chief openings is of the same body as that found in the Highland Mary discovery shaft, and one witness, if I am not mistaken, expressed the opinion that they were not the same. The difference in elevation of the two shafts and the points at which mineral was found, in connection with the topography of the country, seems to raise a doubt on that subject. If you are of the opinion from the evidence that there are two bodies of mineral separate and distinct from each other, one in the Highland Chief shaft and the territory in dispute very near to that shaft, and another in the Highland Mary shaft, it will be a question of fact on the evidence whether the latter extends under the first into the territory in dispute.

It is incumbent on the plaintiffs to establish these facts by preponderating testimony, and, in the absence of such testimony, you should find for defendant. If, however, those facts are established, the plaintiff may prevail, unless defendant has shown a better title to the ground in dispute.

And your attention will now be asked to the facts necessary to establish such better title.

Much that has been said with reference to the Highland Mary location is equally applicable to defendant's location, which he calls the Eliza—that is to say, a lode must have been found in the discovery shaft, and the lode must extend from that point to the ground in dispute. Perhaps there is some doubt here also whether any body of mineral or mineralized rock that may be called a lode was found in the discovery shaft, and if so found, whether the same body was exposed in the territory in dispute. Those questions are submitted to your decision on the evidence, and assuming that the plaintiffs have established their right, as before explained to you, if you further find that defendant's grantors discovered a lode in the Eliza discovery shaft and that such lode extends from thence into the ground in dispute, the defendant will prevail.

Because, as was before explained to you, plaintiffs' right can not be of earlier date than July 30, 1879; and defendant, if his grantors made a valid discovery and location, dates back to 1878, long prior to the date of plaintiffs' title by possession. It is true that there is some controversy upon the question whether, at the time of the survey of the Eliza lode in July, 1878, the locators had sunk their shaft to the point where they claim to have found the lode; but if they had not done so, they did, in fact, sink it to the point mentioned by September following, and if they then found a lode, they could have advantage of it as against all who had not then acquired an interest in the lode in the same manner as if they had uncovered it before making their survey and filing their certificate.

And if their location was completed by or before September, 1878, it antedates plaintiffs' title by possession in the same manner as it would if it had been completed in July of that year.

In that view, the question as to defendant's title still remains, whether a lode was discovered in the discovery shaft, and whether such lode extends from that point to the ground in controversy.

If the plaintiffs have established their title, as first ex-

plained to you, and the defendant has not established his title, your verdict should be for plaintiffs. If the plaintiffs have failed to establish their title, or the defendant has established his title, your verdict should be for defendant.

Verdict for defendant.

JUPITER MINING Co. v. BODIE CONSOLIDATED MINING Co.

(11 Federal Rep. 666, 7 Sawyer, 96. U. S. Circuit Court, District of California, 1881.)

Length and width of lode claims. The act of Congress of May 10, 1872, authorizes a claim to be located 1,500 feet in length along the vein, and, in the absence of any local rule or custom, the width of such claim may extend 300 feet on each side of the middle of the vein; but said act of Congress, by implication, authorizes the miners to limit the width of such claims to 25 feet on each side of the middle of the vein.

Miners' rules must be in force. To be of any validity, a rule or custom of miners must not only be established or enacted, but must be *in force* at the time and place of the location. It ceases to be operative whenever it falls into disuse, or is generally disregarded.

Must not conflict. The rules and customs of miners must not conflict with the laws of the United States, or the laws of the State in which the claims are located.

District rule may exist in parol. Section 748 of the Code of Civil Procedure of California is still in force, except so far as it is limited by act of Congress; and no distinction is made by this provision of the State statute between a custom or usage proved by parol evidence and a rule adopted by a miner's meeting and recorded in writing.

Existence of rule is a question of fact. Whether or not a mining law or custom is in force at any given time is a question of fact; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved.

Void for excess of width. Where a location, otherwise valid, exceeds the width allowed by law, it is void as to the excess, but valid as to the extent allowed by law.

¹Discovery of a vein. No rights can be acquired, under the statute, by location, before the discovery of a vein or lode within the limits of the claim located.

²Definition of vein or lode. A vein or lode, authorized to be located, is a seam or fissure in the earth's crust, filled with quartz or some other kind of rock, in place, carrying gold, silver or other valuable mineral deposits, named in the statute. It may be very thin, or many feet thick,

¹ *Overman Co. v. Corcoran Co.*, 1 M. R. 691.

² *Leadville Co. v. Fitzgerald*, 4 M. R. 380; *Eureka Co. v. Richmond Co.*, 4 Saw. 302; *Post* LODE.

or irregular in thickness; and it may be rich or poor, provided it contains any of the metals named in the statute. But it must be more than detached pieces of quartz or mere bunches of quartz not in place.

¹ **Discovery of vein after location.** A location is made valid by the discovery of a vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same claim by other persons.

Locator need not be discoverer. It is not necessary that the locator should be the first discoverer of the vein, but it must be known and claimed by him in order to give validity to his location.

Ancillary or side veins—Dip. Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downward, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines.

How location to be marked. A location of a mining claim must be distinctly marked on the ground so that its *boundaries* can be readily traced; but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds and written notices, whereby the *boundaries* can be readily traced, is sufficient.

² **Right of subsequent locator to object.** A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim.

Obliteration of monuments. After a location has been lawfully made, the right of the locator can not be divested by the mere obliteration of the marks or removal of the stakes without his fault, he having performed the other acts required by the statute.

³ **Record—Stake may be permanent monument.** The law of Congress requires no record of a mining claim except in obedience to valid local rules or customs of miners; but when such local rules or customs require a record it must contain the names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument, as will identify the claim. But such natural objects or permanent monuments are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground or of a shaft sunk in the ground. If by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular, otherwise not.

¹ *Golden Terra Co. v. Mahler*, 4 M. R. 390.

² *Zollars v. Evans*, 4 M. R. 407.

³ *Golden Fleece Co. v. Cable Co.* 1 M. R. 120.

Object and effect of record. The object of recording mining claims is to give notice to others desiring to locate in the vicinity. The language of the act of Congress authorizing miners to make regulations "governing the location and manner of recording," implies that the act of location is distinct from that of recording, except where the regulations of miners make recording necessary to constitute a location; so that a location may be complete and vest the exclusive right of possession before any record thereof is made, unless recording is made an act of location, or one of the acts necessary to constitute a location, by miners' rules or regulations.

Forfeiture by failure to record. The right to a mining claim will not be forfeited by a failure to record the same, in the absence of a miners' rule or regulation providing for a forfeiture on that ground.

Effect of actual notice. In the absence of any miners' rule or regulation making recording a necessary act or condition of a complete location, or providing for a forfeiture by failure to record, a prior location of a mining claim, without recording the same, gives the locator thereof the exclusive right to possess and enjoy the same as against all persons having actual notice of such location and the extent thereof.

Work necessary to hold a claim. The statute requires \$100 worth of work on each claim located after May 10, 1872, in each year, and, in default thereof, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year and before any relocation is made, he thereby preserves his claim. The statute nowhere authorizes a trespass upon, or a relocation of, a claim before located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

¹ **Annual labor by working one of a group of claims.** Where one person or company owns several contiguous claims capable of being advantageously worked together, one general system may be adopted to work such claims; and work done according to such system for the purpose of prospecting or working all such contiguous claims, although done on only one of such claims, or even outside of all of them, is available to hold all such contiguous claims intended to be worked or prospected by such general system.

This was an action in the nature of an action of trespass upon a lode mining claim in the Bodie mining district, California, in which the defendant pleaded title to the *locus in quo*. The case was removed from the State Court to the Circuit Court of the United States, where it was tried by a jury.

GARBER, THORNTON & BISHOP and ROBERT M. CLARK, for plaintiff.

¹ *Mt. Diablo Co. v. Callison*, 5 Saw. 439; *Post* LODE.

STEWART, VANCLIEF & HERRIN and P. REDDY, for defendant.

SAWYER, C. J. (charging jury).

Counsel having ably discharged their duty, it now devolves on the court to state to you the law governing this case, and then it will be your duty and your province to determine the facts. The questions of fact are for you alone to determine; the weight to be given to the evidence, the credit to be given to the witnesses, and everything relating to a disputed question of fact, is for your sole consideration and determination.

If I state the testimony I shall only do it for the purpose of calling your attention to it and stating its tendency, but I shall not go over it fully. If I intimate an opinion on a disputed question of fact you are not to be governed by it unless it corresponds with your own ideas as to what the facts are. If I make a mistake in stating the testimony, or alluding to a fact, you will correct it by your own recollection and judgment. I do not intend to express an opinion on the disputed questions of fact, or where the testimony is in conflict. I shall state to you the law which governs this case, and it is your duty to take the law from the court.

You will examine the testimony calmly, carefully and impartially, and announce the result by your verdict.

First in the order of proceedings, you will naturally consider the questions that arise on the plaintiff's title. I do not understand the defendant to insist that the plaintiff has not made out a *prima facie* title to the ground covered by its claims, now known as the Jupiter Company's ground, embracing the four claims, the Savage, the East Savage, the Riordan and the Daley. It does claim, however, by its own evidence, to overthrow that title by showing a title in itself prior and superior to that title. *Prima facie*, I do not understand the defendant to claim that plaintiff has not shown its title to these claims; but the question that arises on its title is, is the point on the Actæon vein, where the acts complained of were committed, within the claims of the plaintiff? Does the plaintiff own the lead at the point where the acts complained of were performed? If it does not, then it has no title to the vein worked upon, and it is not injured by the act of the defendant, and your verdict must be for the defendant, whether

the defendant has shown title to the vein in question or not. Unless the plaintiff has title to that vein, it can not recover in this action. That point, therefore, is an important one for you to determine; and it is the first question in logical order that arises in this case.

It will be convenient for you to dispose of this first. I will therefore first call your attention to it. If you find that point against the plaintiff, it will be unnecessary for you to go further. In order that the plaintiff should be the owner of the Actæon vein, it must be one of the veins or ledges which was located in one of plaintiff's four claims, or it must have its top or apex within the side lines of some one of its claims, drawn vertically downward.

The first question, then, is, is it one of the ledges which plaintiff's grantors located? The point where the acts complained of were performed is here (pointing on the model), from this point downward, in what has been termed—and the name may be used to designate the place here—the Actæon ledge. The plaintiff insists on two positions: First, that it is the lode which its grantors located in the Savage, and which claim was located on this lode here, which plaintiff's counsel says, according to the strike of the lode, runs somewhere in this direction. The plaintiff does not locate it on, or claim that it was any other lode than that, I believe. Then is it identical with the lode which was located in the Savage claim? Now, this is known to have been exposed and is seen only in these two places. That fact, in connection with the other facts in relation to the formation of the country rock around here, and the other surrounding facts, is the fact from which you must determine that question—whether it is or is not that lode. It is insisted on the part of the defendant, that this is a mere spur or offshoot of the Fortuna lode. If it is not such a spur or offshoot, then it insists that it is an independent lode, wholly disconnected from any of the other lodes.

Now, gentlemen, if that is only an offshoot or spur of the Fortuna lode, in such a way as to be simply part of that lode, then the plaintiff has no title to it, and it claims none. It disclaims any title to the Fortuna lode.

It is for you to determine from the testimony whether it is part of the Fortuna lode, or whether it is an independent lode,

or if it is a part of the Savage lode. If it is a part of that lode in the Savage which plaintiff located, then, if the plaintiff has title to the Savage, it has title to that vein. If it has not title to the Savage, it has not a title to the lode through the Savage; or if it is not a part of that lode, then plaintiff has no title to it on that ground.

The next question is, if it is not a part of that lode, then has it its top or apex within the side lines of any one of the plaintiff's claims drawn vertically downward? Because, if it has, and plaintiff has a valid title to that claim, then it is plaintiff's property. If it has not its apex within the side lines of any of plaintiff's claims drawn vertically downward, and is not one of the lodes which the plaintiff actually located, then it has no title to it.

Those are the questions of fact for you to determine on this branch of the case. You have heard the testimony, and the comments of counsel on it, and upon the testimony you must determine the questions. It is insisted by the defendant, if this vein is not a spur or offshoot of the Fortuna lode, that then it is an independent lode; and the plaintiff insists, if it is an independent lode, that it has its top or apex within one of its claims; and the defendant insists that the top or apex is outside of the plaintiff's claims.

If it is an independent lode the question is, in what direction on the dip does it run, and where is its apex or top? Mr. Anderson and Mr. Whiting testified that at this point here, with a mathematical instrument made and used for that purpose, they measured the angles of the dip, and, according to their measurement and their testimony, the dip would carry it some distance outside of the Daley claim, supposing it to run in that direction to the surface. If it is an independent lode and has its top or apex outside of the Daley claim, then it does not belong to the plaintiff. If it is inside of the Daley, if it has its top or apex inside of the Daley or Savage, it does belong to the plaintiff if they have the better title to those claims.

Professor Jenny and Mr. Holmes, on the contrary, testified that they put a plumb-line on the vein, although they do not profess to have measured the angle, and they say it is nearly perpendicular; and, supposing it to go in that direction

to the surface, it would come very near to the Daley line and a little inside. Where the top or apex is, is for you to determine. The plaintiff claims that, owing to the formation of the country rock, the probability is that the vein runs to this point, and then turns off and runs into the Savage. The plaintiff's theory, as I understand the testimony, is that here are two different formations. This formation to the eastward is a secondary formation; this to the westward is the primary (pointing to the map). That the line of stratification runs in different directions in the two formations there. That is claimed to be secondary (pointing). If you believe that theory as to the formation of the rock here, and believe that the lodes found outside or to the eastward of this blue clay stratum run in this direction, and the stratification there in the same direction dipping to the west, and the leads and stratification to the westward, in this direction, dipping to the east, then it will be a question of probabilities for you to determine whether or not this Actæon lode passes up and crosses over the blue clay stratum into the other formation, thence following its line of stratification to the surface, or is it more likely to have pursued its course in its own formation, following the line of its stratification, as this Fortuna vein has apparently done here on the same side of the stratum of blue clay? This Fortuna vein, it would seem, follows its own formation and line of stratification throughout. You are entitled to consider the probability—if these are different formations, as they say—the probability whether the Actæon vein would run in that direction and pass out here into another formation, or whether it would be confined to the formation in which it is found and to which it properly belongs. I can give you no further aid on that question. You must take the testimony as you find it, and view it with a candid and impartial spirit, and give such determination to the question as you think all the facts and circumstances in the case justify. If, then, the Actæon vein is not one of the lodes located by plaintiff; if it has not its top or apex within the side lines of any one of the claims of plaintiff drawn vertically downward,—then it is not the plaintiff's lode, and you will have to find for the defendant, whether the defendant owns it or not. If you find for the defendant on that

proposition, that disposes of the case, and there is no necessity to spend any further time on the other points of the case. If you find for the plaintiff, however, on that issue, that the Actæon is the lode that the plaintiff has located there in the Savage, or has its top or apex within the side lines of any one of the claims that the plaintiff owns drawn vertically downward, it will be necessary for you to consider the defendant's title—whether the defendant has an anterior and a superior title; otherwise it will not be necessary to look at its title. I will say, with reference to this branch of the case, that the plaintiff alleges this to be its lode. It devolves upon plaintiff, therefore, to show affirmatively to you that it is entitled to that lode. The burden of proof is on the plaintiff. If it fails to show it, or if the testimony is equally balanced, then you must find for the defendant, because plaintiff must show by a preponderance of testimony that the lode is within its claim. If it fails on that, your verdict must be for the defendant.

If you find for the plaintiff on that point, as I said before, it will be necessary to consider the defendant's title. I will say with reference to the defendant, as I said with reference to the plaintiff, when you come to the defendant's title the burden of proof is on the defendant. It devolves on it in the same way, by preponderance of evidence, to show that its title is anterior and superior to that of the plaintiff.

Now, gentlemen, in order that you may know whether the defendant has a title or not, it will be necessary for you to be informed what it is necessary to do in order to secure a title to a mining claim.

By an act of Congress which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase, under regulations prescribed by law and according to the local customs or rules of miners in the several districts, so far as applicable and not inconsistent with the laws of the United States.

The location under which defendant especially claims was made since May 10, 1872, and at the time it was made the statute of the United States authorized a claim to be 1,500 feet in length along the vein or lode, and it was provided

that no claim "shall extend more than 300 feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom *in force* at the time of the location at the place where it is made, the location may extend to the distance of 300 feet on each side of the middle of the vein at the surface; that is to say, the claim may be 1,500 feet in length along the vein by 600 feet wide, including 300 feet on each side of the middle of the vein.

As I construe the statute, however, and so instruct you, by implication, the miners, by a rule, regulation, or custom established and in force at the time and place of the location, may limit the width of the claim to 25 feet on each side of the middle of the vein at the surface. But such limitation to 25 feet on each side, to be valid, must be by virtue of a rule, regulation, or custom which has not only been established, but which is actually in force at the time of the location.

The regulation must be in accordance and not in conflict with the laws of the United States and of the State of California; and the laws of California provide that "in actions respecting mining claims proof must be admitted of the customs, usages, or regulations established and *in force* at the bar or diggings embracing such claim, and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action." This provision is still in force, except so far as its operation is limited by the act of Congress.

The Lucky Jack location, under which defendant claims, was made May 26, 1875, and the claim was located 300 feet wide on each side of the lode, in pursuance of the act of Congress allowing such location.

It is claimed by the plaintiff that there was at the time of the location a regulation in force in that district limiting the claim to 50 feet on each side of the vein, and that the location of 300 feet is therefore void. Now, whether there was or not such a regulation or custom *in force* at the time, is a question of fact to be found by the jury from all of the evidence in the case on that point.

The plaintiff, to show a regulation limiting the location to 50 feet on each side, introduced the minutes of proceedings of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation, and minutes of meetings held at various subsequent times, amending the rules, but continuing this rule in force down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had till December 30, 1876, which is a year and seven months after said location, and nine years after any meeting amending said rules.

The defendant, to meet this testimony, introduced in evidence the mining records of the district, from which it appears that no miners' meeting was held, and no mining recorder was elected from July 3, 1869, till October 9, 1875,—more than six years,—and that from and including the year 1872, when the act of Congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district,—there being none after the passage of the act of Congress in 1872, one in 1873 in which no width was specified, and none in the year 1874; that during the year 1875 eleven quartz locations were made, of which nine were made 300 feet on each side of the lode, and purported to have been made in pursuance of said act of Congress, and two only of 50 feet wide on each side, one of which two was marked on the record as abandoned, and during the year 1876 twenty-five locations appear to have been made, of which five were 600 feet wide; one, an extension of a 600 feet claim, having no width mentioned, and the others 50 feet wide on each side. From this it is argued by the defendant that quartz mining in the district, so far as new locations are concerned, was practically abandoned for several years, and no laws on the subject of new locations were practically in force; that on the return of the miners, and the revival of mining in 1875, the act of Congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims 300 feet wide on each side, and in practice adopted and generally acquiesced in that rule during the year 1875, and partially in 1876, till the meeting in December of that year—the rule limiting the claims to 50 feet by common consent falling into disuse and ceasing to be in force.

As held by the Supreme Court of California, in commenting upon the provision of the State statute cited, which is still in force:

"No distinction is made by the State statute between a custom or usage, the proof of which must rest in parol, and a regulation which may be adopted by a miners' meeting, and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following the enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be established, but *in force*."¹

"A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time."

It is for you, then, gentlemen of the jury, to determine whether this limitation to 50 feet was actually in force at the time the location of the Lucky Jack, 300 feet wide on each side, was made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time; and, being once in force, a presumption would arise that it continued in force till something appears tending to show that it had been repealed, or had fallen into disuse, and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether in view of there being few locations in this district during several years, and none in some, and of the passage of the act of Congress referred to, and the location at first, after the revival of the mining interest in 1875, of most all claims, in pursuance of the provisions of the act, 300 feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the 50 feet limitation had fallen into disuse, or was really *in force*

¹ *Harvey v. Ryan*, 42 Cal. 628; *Post* DISTRICT RULES.

at the time of the location in question. If it was *not* in force, then in that particular, if otherwise valid, the location was good and valid to the full extent of 300 feet on each side of the vein. If the limitation was in force, then it was void as to the excess over 50 feet on each side of the vein, but valid to the extent of 50 feet and no more.

The statute also provides, gentlemen of the jury, that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place.

The vein, however, may be very thin, and it may be many feet thick or thin in places—almost or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location, including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode, after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the Lucky Jack discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered was in this particular valid; otherwise, not. The same observation would be true as to each of the other claims held by the plaintiff or defendant.

The defendant claims that its grantor discovered such a vein or lode as I have described in the Lucky Jack, shaft

No. 1. You have heard the testimony on the point, and it is for you to determine whether they did or not. If they did, then the location is good in that respect; otherwise, it is not.

It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him, and claimed by him, in order to give validity to the location. I instruct you further that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid.

The defendant also claims that its grantors discovered veins in shaft No. 2, and its drifts and cross-cuts, long before plaintiff acquired any rights in the ground. If so, the claim is good in that particular. Similar discoveries are claimed to have been made by its grantors in the Warren Loose shaft, drift, winze, etc.

So also, gentlemen of the jury, where a party has made a location upon a mineral vein or lode discovered by him, in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical lines of such surface location."

That is to say, if the defendant or its grantors discovered a mineral vein or lode in the Lucky Jack claim, and made and has now in all respects a valid location of that claim, then it is not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of its surface lines extended vertically downward, to which no right had attached in favor of

other parties at the time its location became valid, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the surface location. If the defendant has a valid claim to 600 feet wide, then its right extends to all such veins or lodes, under the conditions stated, so within the surface lines bounding the 600 feet drawn vertically downward; and if the Actæon vein in question is one of the veins having its top or apex within such surface lines drawn vertically downward, its right extends to and includes that vein. If it has a valid claim to 100 feet wide, and only so much, then to such veins or lodes within the 100 feet lines.

The same principle and instruction applies to the defendant's other claims. If the defendant has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar circumstances, the apices or tops of which lie within the surface lines of such valid location or locations extended vertically downward.

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute, it is required that the "*location must be distinctly marked on the ground, so that its boundaries can be readily traced,*" but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed.

Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. But there must be some such marking, and when a mining claim is once sufficiently marked out upon the ground, and all other necessary acts of location are performed, it vests the right of possession in the locator, which right can not be divested by the obliteration of the marks or removal of the stakes without the fault of the locator, so long as he continues to perform the necessary work upon the ground, and to comply with the law in other respects.

If, then, the jury believe from the evidence that the Lucky Jack claim did not exceed in quantity the amount allowed by the United States laws, and was located in conformity with the actual practice and custom of miners in force in the year

1875, as to the size of claims in the Bodie mining district, and that before the location of the claims of the plaintiff thereon, it was actually and distinctly marked on the ground by stakes, notices, monuments and work, so that its boundaries could be readily traced, and a vein containing gold or silver had been discovered therein, and sufficient work was done thereon to comply with the laws of Congress and the local regulations, and if no record was required other than that actually made, then the Lucky Jack location was valid and entitled the locator to the exclusive possession thereof; otherwise, not.

There is testimony tending to show that the rule and custom of miners in Bodie district at the time the Lucky Jack location, under which defendant claims, was made, required mining claims to be recorded within a certain time after location; and testimony also tending to show that there was no mining recorder elected in Bodie district from July 3, 1869, to October 9, 1875, more than six years, including the period of this location; and that during a portion of this time at least, in the apparent uncertain condition of affairs, some locators recorded their claims in the office of the county recorder, and also in the books of the district in the possession of the last preceding recorder, or of the last preceding deputy recorder, of the district, and the Lucky Jack, at least, in the county recorder's office only.

If you find a rule or custom to record to have been in force in the district at the time, then a record was necessary to perfect and preserve the rights of the locators as against all subsequent locators, at least, not having actual notice of the prior location. If no such custom was in force, then no record was necessary. It was only necessary, in any event, to record at the place where the custom known and in force at the time of the location required the record to be made. If it was sufficient, under the custom in force, to record the location in the county recorder's office, then a record there was sufficient; otherwise, not. And the fact that many miners did so record is evidence tending to show that they thought such record available, and relied on it, and tending to show such custom. The custom to record, *and the place of the record*, to be binding, ought to be so well known, understood and recognized in the district that the locators should have no

reasonable ground for doubt as to what is required to make and preserve a valid location. It is for you, gentlemen, to determine from the evidence in the case what record, if any, and the place where it must be made, the custom in force at the time required; whether the custom was in all particulars sufficiently known and recognized to make it binding upon the miners; and whether the location of the Lucky Jack claim substantially conformed to it. In determining these questions, the fact, if it be a fact, that there was an uncertainty as to where a record should be made—some recording in the district records, some in the county recorder's office, and many in both; the fact that there was no recorder elected for six years; that Bechtel, the last deputy, and the man who seems to have actually done the recording, resided, during a portion of the time, out of the district, coming, in some instances, at the request of parties, from his residence into the district to record claims; and the fact that miners at their first meeting in October, 1875, after several years' *hiatus* in their meetings, deemed it necessary, or at least prudent, to ratify and validate by resolution the records of the preceding five or six years, are all circumstances that the jury are entitled to consider, as tending to show that there was no custom as to the place where the record should be made prevailing during that period, sufficiently certain, well known and defined, and generally recognized and acquiesced in, to be of any binding force.

The jury are entitled to give these circumstances such weight, in connection with all the other evidence bearing upon the question, as they deem them entitled to receive. And it is for you to determine whether, under the circumstances, a record in the county recorder's office was sufficient.

If a record was required, then, in order to make a valid record, it was necessary for it to contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located, by reference to some natural or permanent monument, as would identify the claim.

The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist

of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground.

The exact effect of a record, or want of a record, I have not before had occasion to consider. The law of Congress authorized miners to make regulations "governing the location and manner of recording * * * mining claims." This language implies that the act of location is distinct and different from the act of recording, except in districts where the regulations of the miners make the recording an act of location, or one of the acts necessary to constitute a location. But in the Bodie mining district there is no evidence of a miners' regulation or rule which makes recording an act of location, or necessary to a valid location. The location is always referred to in the rules in evidence as distinct from and preceding the record, so that a location of a mining claim in that district, at any time in the year 1875, may have been complete or perfect before any record thereof was made.

Independent of the question of forfeiture, therefore, it follows, under the written rules in evidence, that, by an otherwise valid location of a mining claim in the Bodie mining district, at any time in 1875, a person may have acquired the exclusive right of possession and enjoyment of such claim, at least as against other parties having actual notice of the claim, its position and extent, before recording such location.

Assuming the proposition that the miners have authority to make a regulation or law by which a mining claim may be forfeited by failure to record the location thereof, yet such regulation or law, in order to effect a forfeiture, must provide that such failure to record shall work a forfeiture of the claim. In the language of the Supreme Court of California:

"The failure of a party to comply with a mining rule or regulation can not work a forfeiture unless the rule itself so provides. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture; if so, a failure will not work a forfeiture." *Bell v. Bed Rock Co.* 36 Cal. 219. "The failure to comply with any one of the mining rules and regulations of a district is not a forfeiture of title. It would be enough to hold the forfeiture as the result of non-compliance with such of

them as make non-compliance a cause of forfeiture." *McGarrity v. Byington*, 12 Cal. 431.

As a general principle of law, forfeitures are not favored.

The object of recording mining claims is to give notice to others desiring to locate claims in the vicinity. The congressional law does not require a record, but prescribes what a record shall contain when it is required by the local rules.

If there were no local rules in Bodie mining district attaching the penalty of forfeiture to the failure to record in that district, and recording was not made by custom an act of location, then the fact that the Lucky Jack claim was not recorded in the records of Bodie mining district will not invalidate the location, as to any party having actual notice of that location, and in that case the jury are instructed that if the Lucky Jack location was regular in all other respects, and the laws requiring work were complied with, the fact that the claim was not recorded in the Bodie mining district did not invalidate the location, or make it lawful for plaintiff's grantors, if they had actual notice of the previous location, to enter and locate the ground covered by the Lucky Jack location.

The testimony also tends to show that prior to the location of the Daley claim, or to any rights being acquired thereunder by the plaintiff, the defendant or its grantors, in addition to the stake or stakes, whichever it was, and notice put up at the time of location of the Lucky Jack claim, surveyed out that claim and planted prominent surveyors' stakes and monuments at the various corners of the claim, distinctly marking it out and forming a parallelogram 1,500 feet long by 300 feet wide, and entered into actual possession; and it is claimed that if there was at the time of the location any defect in the marking on the ground, this additional marking, before any rights were acquired by the plaintiff in the Daley, was clearly sufficient to validate the claim as to that location. In regard to this point I instruct you, gentlemen, that a subsequent locator can not object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

If, therefore, the claimants of the Lucky Jack surveyed and properly staked or marked out their claim, and performed all the other acts necessary to make a valid location, before any rights were acquired in the Daley ground by the location of that claim, then the better title vested in the owners of the Lucky Jack to all the Daley claim embraced in the Lucky Jack which the locators of the latter were entitled to locate and hold.

The statute requires \$100 in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and, in default of such work being done, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon or to relocate a claim before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

Whether the work was done as required by the statute is a question for you to determine from the evidence. Work done by any of the grantors of defendant while holding the claim, whether holding the legal or equitable title, during the performance of the labor or work done in the interest of the claim, is available to preserve the claim, and no mere relocation for forfeiture, made before the forfeiture actually attaches by actual default, would be valid to defeat the claim. Any work done by the Bodie Company on the claim for that purpose, after the conveyance to it, October 7, 1877, and before May 26, 1878, is available as work for the year from May 26, 1877, to May 26, 1878, to prevent a forfeiture. With regard to the work required to be done in order to hold a claim, the jury are further instructed that where one person or company owns several contiguous or adjoining claims capable of being advantageously worked together, one general system may be adopted to work such claims. Such sys-

tem may consist of a shaft with drifts, cross-cuts, and tunnels therefrom, and such works need not be upon any of the claims in question. When such system is adopted, work in furtherance of the system is work on the claims intended to be developed by it. Work done outside of the claims, or outside of any claim, if done for the purpose and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself.

To conclude, gentlemen of the jury, in view of the legal principles I have stated to you, if you find from the evidence that the so-called Actæon vein, upon which the trespass is alleged to have been committed, is not one of the veins actually located in either the Savage, East Savage, Riordan, or Daley claims, and if its top or apex is not within the planes of the side lines of either of said claims drawn vertically downward, then it does not belong to the plaintiff, and your verdict must be for the defendant, whether it has title to the claim or not. The plaintiff can not recover unless the vein belongs to it. So, if the top or apex of said Actæon vein is within the planes of the side lines drawn vertically downward of any mining claim to which the defendant has shown a valid title prior in point of time to the title to any of the four claims relied on by plaintiff in like manner embracing said vein, whether such valid prior claim of defendant be 600 or 100 feet wide, the verdict must also be for the defendant. But if, on the contrary, you find that the said Actæon vein, at the point where the trespass is alleged to have been committed, is the vein actually discovered and located by plaintiff's grantors, in any one of the said four claims of the plaintiff, or that it has its top or apex within the planes of the side lines of any one of said four claims drawn vertically downward, and if you further find that the defendant has not shown a title as against said plaintiff by a valid subsisting prior location embracing said top or apex within its side lines drawn vertically downward, then your verdict must be for the plaintiff.

Gentlemen, I believe the testimony is very indistinct as to the amount of damages. No testimony was offered as to the amount of damages. If you find for the plaintiff, and you

have no testimony on which to estimate correctly the amount of damages sustained, you will find nominal damages, say one dollar. The form of the verdict will be, "We, the jury, find for the plaintiff, and assess the damages at so much." If you find for the defendant your verdict will be, "We the jury, find for the defendant."

A Juror. How can the jury find a certain sum when no evidence was offered?

The Court. You will then find nominal damages, one dollar.

The verdict of the jury was for the defendant.

CROSSMAN ET AL. V. PENDERY ET AL.

(2 McCrary, 139; 1 Colorado Law Reporter, 496. U. S. Circuit Court, Dist. Colorado, 1881)

¹ **Title by possession before discovery of mineral in place.** A prospector on the public mineral domain may protect himself in the possession of his claim while he is searching for mineral; but if he allows another to enter upon his claim, and first discover mineral in rock in place, the second comer will have the better title to the mineral.

T. A. GREEN, for plaintiffs.

WM. HARRISON, for defendant.

MILLER, J.

This cause is submitted upon an agreed state of facts, to the effect that the ground in controversy is covered by the surface lines of the Orion claim, located by plaintiff, and also of the Pendery claim, located by defendant; that both locations are regular as to form; that the Orion was first located, surveyed and staked; that the locators have steadily prosecuted work in the development thereof, and have discovered mineral in place; that the discoverers of the Pendery, located subsequently to the Orion, and while the locators of the latter were in possession thereof, also prosecuted work and discovered mineral in place before the discovery by the locators of the Orion. The question submitted to the court is this: Can prospectors on the pub-

¹ *Erhardt v. Boaro*, 4 M. R. 432.

lic mineral domain acquire any right in which the law will protect them, prior to the discovery of mineral in rock in place? And if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the land in controversy?

It is the opinion of the court, that inasmuch as the plaintiffs allowed the defendants to enter upon their claim and within their boundaries, and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and to make location thereof without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party.

A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface can not prevail, and in this case judgment must be for the defendants.

ERHARDT ET AL. V. BOARO ET AL.

(2 McCrary, 141. U. S. Circuit Court, Dist. Colorado, 1881.)

Discovery notice holds the claim pending location--Constructive possession. The statute of Colorado, which gives sixty days after the discovery of a mining claim in which to sink a discovery shaft and make a location, does not require the discoverer to remain, during that interval, in actual personal possession by being present upon the ground. The erection of the discovery stake, with the required notice thereon, is notice to all others of the claim of the discoverer, and amounts to constructive possession, which is sufficient during the period provided by the statute.

Location prevented by intimidation. That the discoverer is prevented from completing location within the prescribed time by intimidation on the part of an adverse claimant, is sufficient excuse, and will not deprive him of his right to locate the claim.

¹ S. C. 4 M. R. 434.

² *Crossman v. Pendery*, 4 M. R. 431.

M. B. CARPENTER, WELLS, SMITH & MACON, for plaintiffs.

MARKHAM, PATTERSON, THOMAS & CAMPBELL, for defendants.

MILLER, J.

Plaintiffs, while prospecting on the public domain, discovered mineral within about two feet of the surface of the ground, and on the 17th day of June set up their discovery stake, containing the name of the lode—Hawk—the date of the discovery, the names of the discoverers, and the other matters substantially as required by law. On the thirtieth day of June, thirteen days thereafter, the defendants pulled up the stake so set by the plaintiffs, threw it away, entered into possession, and went to work in the same hole, and having sunk the shaft to the required depth, made a location of the claim.

Plaintiffs brought their action at law for the possession, alleging that they were the discoverers thereof, had planted their discovery stake, and within the sixty days allowed by law in which to complete the sinking of their prospect shaft and make their formal location, the defendants wrongfully entered and hold the claim; and plaintiffs seek an injunction in aid of their action at law, to restrain the defendants from working the claim and removing ore therefrom. The affidavits filed in support of the motion for injunction show that in consequence of threats made by defendants, plaintiffs were deterred from entering on the claim and prosecuting the development work within the time required, and that, though they procured a survey to be made, upon which to make out a location certificate, this was done secretly by the officer who made the survey for defendants. It is claimed for defendants that the plaintiffs were not in actual possession of the claim between the 17th day of June, the time they set their stake, and the 30th of June, when defendants entered; and further, that the notice upon the discovery stake of plaintiffs was not sufficient in that it failed to give the course of the lode.

The law of the State gives sixty days after making discovery of mineral, in which to sink a shaft ten feet in depth. The main object of the sixty days' possession, it seems to the

court, must be to allow time to discover the course of the lode, in order that the location may be made thereon. Counsel for defendants made an ingenious argument to show that the locator during those sixty days, to hold his right, must remain in continuous actual possession of the ground. The court does not so hold. If the discoverer put up a stake at the discovery, giving the name of the lode, date of discovery and notice of his intention to locate the claim, this is equivalent to actual possession. Otherwise the statute serves no useful purpose. The intention of the statute must be that the setting up of the discovery stake, with the notice thereon as required, is equivalent to actual possession for the sixty days within which he may proceed to the next step, to wit, sink the discovery shaft to the depth of ten feet, have survey made, mark the lines, and make formal location.

That the plaintiffs did not sink the shaft to the required depth of ten feet within the sixty days, can not prejudice their right in this case, for the reason that the defendants prevented them from so doing by taking possession of their excavation. Plaintiffs could not prosecute their work while the defendants were in the occupancy, and this is sufficient reason for not sinking the shaft within the time prescribed. The injunction will be awarded.

¹ERHARDT V. BOARO ET AL.

(3 McCrary, 19; 2 Colo. L. R. 89. U. S. Circuit Court, District of Colorado, 1881.)

Location—Time allowed. Upon the discovery of a lode bearing silver in the public lands, a citizen is entitled to locate a full claim, and he has the time allowed by law to complete the location.

Notice—How made. A notice posted at the point of discovery, specifying the nature and extent of his claim, will protect the locator's right for the time allowed by law in which to complete the location, although he may be absent from the claim during part of such time.

Same—Must specify extent of claim. But if he fails to specify in his notice of discovery and claim to the ground the extent of his claim, as that it extends a certain distance from the point of discovery in a direction named, it will relate only to the place where it stands. As against others afterward locating in the vicinity, it will cover only ground necessary for sinking a shaft.

¹S. C. 4 M. R. 432.

Estoppel—Trespasser. One who goes on ground taken up by another for mining purposes during the temporary absence of the first locator, and excludes him therefrom, and thereby prevents the first locator from completing his title, shall not be permitted to allege any defect in that title.

THOMAS MACON, H. C. THATCHER and J. M. SEMPLÉ, for plaintiff.

THOMAS M. PATTERSON and JULIUS THOMPSON, for defendants.

Ejectment for a mining claim in the county of Dolores, called by plaintiff Hawk lode, and by defendants Johnny Bull lode. Plaintiff alleged a location begun in June, 1880, by one Thomas Carroll, who was employed by plaintiff to search for lodes, under an agreement to give plaintiff four fifths interest in all locations made by him, Carroll retaining one fifth for himself. Carroll testified that he found at the place in controversy, on the surface of the ground, indications of a lode and, with a pick, made an excavation a foot or eighteen inches in depth, which disclosed a lode very clearly, and that he planted there a discovery stake, claiming the lode for plaintiff and himself. The notice on the stake was in the usual form except that nothing was declared as to the length of the lode or its extent in either direction from the point of discovery. The stake was set up on the 17th day of June, and Carroll returned to the place about the 1st of August thereafter with intent to resume work, and to sink the shaft ten feet or more and complete the location. Finding the place occupied by Boaro and Hull, two of the defendants, he was deterred from any attempt to regain possession by threats of violence from them. The threats were not made to Carroll, but were communicated to him by others. Aside from the testimony of Carroll himself, to the effect that the threats were communicated to him, there was nothing to show that they were made during the time for completing the location; but some witnesses testified that they heard threats from the parties in possession after that time. Carroll also said that the situation of the defendants as "jumpers" induced him to believe that they would resist his claim with force. At all events, he made no demand for the premises, nor did he attempt to go on with the work after he discovered that they

were occupied. He applied to plaintiff's agent in Rico for assistance to regain possession, which was denied him on the ground that legal steps would be taken for that purpose. Carroll's testimony was supported by other witnesses on some points which it is not necessary to enumerate. A surveyor employed by defendants to survey the ground for re-location, without the knowledge of defendants, set up boundary stakes for plaintiff's Hawk location, and gave a description of the premises, which plaintiff inserted in a certificate of location and filed it for record within the time limited by statute for making and recording such certificate. Neither Carroll nor plaintiff sunk any discovery shaft on the ground in dispute, or posted a notice of discovery, except that mentioned by Carroll as having been set up on the 17th of June.

At the close of plaintiff's testimony, defendants moved for judgment of nonsuit, on the ground that plaintiff had not shown a location complete under the statute. Counsel urged that plaintiff could have no right to the possession except on proof of all things necessary to a valid location, done within the time limited by law. And this, although it should appear that defendants prevented Carroll from going on to complete the location, by threats or by occupying the ground. And it was said, that to give plaintiff a right of action would be to declare that the work done by defendants in sinking a discovery shaft and putting up notice of discovery should inure to plaintiff's benefit.

The court said that no such presumption could be indulged, and that it was not necessary to assume that the work had been done by any one. If, as contended by plaintiff, defendants took possession of the ground with knowledge of Carroll's prior location, and prevented Carroll and the plaintiff from going on with the work, they should not have advantage of their own wrong. Under the circumstances charged, the defendants could not be allowed to deny the force and validity of plaintiff's location in any way. The motion for judgment was denied.

Defendant Boaro then testified that he made the Johnny Bull location in the last days of June, 1880; that he found nothing on the surface of the ground to indicate a lode, nor any such excavation or stake as that mentioned by the witness

Carroll; that, upon all the territory covered by the location, there was nothing whatever, at the time he went upon the ground, to show that it had been located on the 17th day of the same month or at any time. This witness was supported in some portions of his testimony by others, and, on the whole evidence, it must be said that it was very conflicting on the principal points affecting the two locations. But it was conceded that the plaintiff's, if made at all, was prior to the other in time.

In the course of the trial it became a question whether the plaintiff, on evidence of title to four fifths interest in the Hawk location, could have judgment for the entire interest. Counsel maintained, that in an action against a stranger to the title, a tenant in common may sue for his co-tenants as well as himself. The point was not then decided, and afterward proof was offered by defendants of certain declarations of Carroll, to which plaintiff objected that he was not bound by them. But the court said, that if the suit was brought for Carroll's interest, as well as that claimed by plaintiff in his own right, the declaration should be received as affecting Carroll's one fifth interest. Thereupon the plaintiff declared that he would maintain his action for his own interest only, and the evidence was excluded. Plaintiff asked leave to amend his complaint, to demand four fifths interest instead of the whole, and it was allowed him.

The court charged the jury as follows:

HALLETT, D. J.

First—The first question for the consideration of the jury is as to the discovery of a lode or vein of silver-bearing ore by Carroll at the place in controversy. It is incumbent on the plaintiff to show, by preponderance of testimony, that such discovery was made. On this point, there is the testimony of Carroll as to what he found there, and some evidence on both sides as to the condition of the ground in the locality. The position of the plaintiff is, that the lode cropped out at the place, and was clearly disclosed by the slight work with a pick, which Carroll testifies to. The position of the defendants is, that there was not on the surface of the ground any

indications of a lode, and that it was necessary to make a considerable excavation to reach the lode. They also claim that there was no excavation whatever, such as mentioned by Carroll, at the place in controversy at and before the time of the location by Boaro. I am requested by plaintiff's counsel to add that it is not essential to the validity of a discovery that the mineral-bearing rock should be found in place.

If the outcrop of the vein or body of mineral-bearing rock is found on the surface, the law allows the discoverer the period of sixty days from the date of his discovery, for showing the vein or body of mineral-bearing rock to be in place at a depth of ten feet or more from the surface.

That proposition is correct.

The foregoing question, on which the testimony is conflicting, you are to determine, and if, upon that, you find for the plaintiff, you should proceed to the matters hereinafter stated. If on that point you find for defendants, your verdict will be for them on that alone, without reference to any other matter.

Second—If you find the first point for plaintiff, a further question for your consideration is as to the posting of notice at the point of discovery. It is incumbent on the plaintiff to show by preponderance of testimony, as before stated, that a notice of the discovery and of the claim of the locator was put up at the point of discovery.

Notice in any other form would be as effectual, probably, but as the plaintiff claims that the notice was posted on the claim, it is only necessary to consider whether that method was adopted.

Carroll testifies that he posted a notice in his excavation at the point of discovery, and there is some evidence of admissions or declarations by Boaro to the effect that he found a stake there when he went on the ground. The defendants claim that no such notice was posted, and none found there by Boaro when he made his location. This is a controverted question, similar to the first stated, which you are to determine on the evidence.

If you find that notice was posted as testified by Carroll, you should also find that it was sufficient for the purpose for which it was designed, with this modification. It is in evidence, and it seems to be conceded by plaintiff, that the no-

tice on the stake contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom.

In this respect the notice was deficient, and, under it, the locators could not claim more than the very place in which it was planted. Elsewhere, on the same lode or vein, if it extends beyond the place in controversy, any other citizen could make a valid location; for this notice, specifying no bonds or limits, can not be said to have any extent beyond what would be necessary for sinking a shaft.

Third—If you find these matters for the plaintiff, a third question for your consideration is, whether defendant Boaro, in making the location under which defendants claim, went into the slight excavation made by Carroll and there sunk his own discovery shaft, or run his own cut, making that the basis of defendants' location.

If he did so, the plaintiff having then a right to that locality, as before explained, the entry of Boaro was an intrusion into his territory, for which he may maintain this action. But it should appear to you, from the evidence, that Boaro entered at the very place which had been previously taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted. Possibly the rule here laid down may be applicable to the case in which a subsequent locator may sink his discovery shaft so near to that of the first locator, as to prevent further work by the latter in the development of the claim. But it is not necessary to advert to that matter, for the plaintiff contends that Boaro went into the very place where Carroll made his excavation and planted his discovery stake, and there made a cut, shaft or other opening, on which to found his own location.

That is the question in issue between the parties, and you should decide it on the evidence.

Fourth—These things being found for the plaintiff, a fourth question for your consideration is, whether Carroll, after discovering the lode, abandoned it.

To perfect their location, it was incumbent on the plaintiff-

iff and Carroll, as the locators of the claim, to sink a discovery shaft within sixty days after the date of location, and to do the other things required by statute within ninety days from that date. Failing in that, they would have no right whatever to the territory in controversy. And although Carroll may have intended to do the necessary work, and to perfect the location within the time limited by statute at the time he set up his stake, if he afterward abandoned that intention, the plaintiff can not recover. It should appear to you, from the evidence, that the plaintiff and Carroll, at the time the Hawk location was made, and continuously thereafter, held and maintained the purpose and intention to complete the location, and that they were prevented from doing so by the act of Boaro and Hull in taking possession of the place in controversy, and excluding Carroll and the plaintiff therefrom. If, by the use of reasonable diligence, the plaintiff and Carroll could have obtained possession for the purpose of doing the necessary work, it was their duty to use such diligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand. But they were not bound to attempt to do the work at any other place than that which had been selected by Carroll, nor were they bound to use force to gain possession, or even to bring an action therefor. If they were excluded by Boaro and Hull from the possession of the very place selected by Carroll for his discovery, cut or shaft, with intent on the part of the latter to hold the ground against them, it is enough on this point.

Fifth—These several questions must be found for plaintiff, by preponderance of testimony, to support a verdict in his favor, for if after one has discovered a lode, and set up a notice of his claim to it, and within the time fixed by law for doing the work necessary to a valid location, another, coming to the same place and taking possession thereof to the exclusion of the first, shall not have advantage of his own wrong; nor shall the subsequent locator in such case be permitted to allege anything against the right of the first locator.

To permit the junior locator to deny the right of the other, under such circumstances, would be to deny him all remedy, which can not be allowed.

And, therefore, if the facts mentioned are established by the evidence, the regularity and validity of plaintiff's location shall be assumed. And if upon the evidence you affirm the foregoing propositions for the plaintiff, your verdict should be for him.

If you deny any or all of them, you should find for defendants.

The jury returned a verdict for defendants.

VAN ZANDT, Trustee, v. THE ARGENTINE MINING CO.

(2 McCrary, 159. U. S. Circuit Court, District Colorado, 1881.)

Admission of paper title—Defective location certificate may be amended. When there is conflicting evidence touching the facts necessary to make valid the original location of a mining claim, the paper title of grantees claiming under the original locator will go to the jury. A location certificate which is fatally defective, in omitting reference to natural object or permanent monument, may go to the jury in connection with an amended certificate correcting such defect.

Practice—Amendment at the hearing. Plaintiff having declared for the entire property, it was developed on the trial that in consequence of a defective deed he had title to only two thirds of the claim: *Held*, that plaintiff could not, on this declaration, recover for two thirds, and that the person holding title to the other third of the claim might not, without his consent, be joined as party plaintiff, yet plaintiff might amend his complaint so as to demand but two thirds.

Prerequisites to location—Discovery outside of discovery shaft. Under the statutes, Federal and State, no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim; and a discovery shaft must be sunk thereon to the depth of at least ten feet. The mineral or ore so discovered must be in position—in the form of a lode—and not in a broken and fragmentary condition, intermingled with slide and *debris* on the surface. Discovery of ore after location, in a different part of the claim, will not avail.

The burden is on the plaintiff to establish the fact that ore was so found in his discovery shaft, and that the same lode is continuous to the ground in controversy.

Evidence, what shall be of prior location. Proof of the date of plaintiff's location, the others not being shown, and the fact that plaintiff's location is excepted from defendant's patents, will raise a presumption that plaintiff's location was first made.

The top or apex, on a junior discovery—Senior location on the "dip" will hold. Ordinarily the owner of a mining claim in which is found

the top or apex of a lode, may follow the vein within or without his side lines on its "dip" to any depth; yet if the same vein has been previously discovered and located on the "dip," such discovery will prevail against a junior discovery, though located on the apex of the vein.

CHAS. S. THOMAS, THOS. M. PATTERSON, JAS. B. BELFORD,
attorneys for plaintiff.

H. C. THATCHER, G. B. REED, attorneys for defendant.

Action to recover possession of the Adelaide mining claim,
in California District, Lake County, Colorado.

Plaintiff offered evidence to prove that the claim was located by Walls and Powell, in the year 1875. As to marking the boundaries of the claim on the surface of the ground, and the finding of valuable ore in the discovery shaft, the evidence was slight; and defendant objected to plaintiff's record title, on the ground that these facts were not shown. As there was some evidence on both points, the court held that the paper title should be received. In the original certificate of location, the description of the claim contained no reference to a natural object or permanent monument; but this was corrected in an amended certificate, and both were received, although it was held that the first was fatally defective.

Having declared for the entire interest in the claim, plaintiff failed to show title from the original locators to an undivided one third interest. One of the deeds upon which he relied was not sufficiently proved, and upon defendant's objection it was excluded. Thereupon he moved for leave to make the grantor in that deed, in whom the title to the said one third interest would rest (assuming that instrument to be void) a party plaintiff in the suit.

And this was denied by the court:

First—Because the deed, for aught that appears, was effectual between the parties to it to transfer the property; and,

Second—A stranger should not be made a party to the suit, without his knowledge and consent, which is not shown.

Plaintiff then suggested to the court, that upon his declaration for the whole interest, he could take a verdict for two thirds, pursuant to sixth paragraph of section 251 of the Code

of Procedure of the State. But the court was of the opinion that section 249 of the Code, which requires the plaintiff to state the interest claimed by him, should control, and that plaintiff, having declared for the whole, could not recover an undivided interest. Nevertheless, the plaintiff was allowed to amend his complaint at the trial so as to demand but two thirds interest, and the court said that this was often done. For the plaintiff having at first asked judgment for the whole, the defendant can not now be surprised that he asks only a part.

In the further trial of the cause it appeared that the defendant claimed under two locations, called the Camp Bird and Pine, which is held by patent from the Government. Plaintiff's claim is in the general course north and south, or, to be exact, north $33^{\circ} 10'$ east. Defendant's two claims overlapping the other somewhat transversely, are in the general course east and west. The contesting claims have the relation of the jaws of shears, and the ground in controversy is that included in the space of intersection and a small part of the Adelaide claim immediately north of the intersection. The discovery shaft of the Adelaide claim is or was at the north end of the claim and some 300 or 400 feet from the ground in controversy. By later operations and the erection of a mill and ore house in the vicinity, it had been filled, and the position of it in the claim was not *very* well shown. Between this shaft and the ground in controversy, there were no openings to prove that the lode extended in that direction, and whether it did so extend was strongly controverted. Defendant gave evidence to prove that no mineral was found in the discovery shaft, and that the condition of the ground was such, that if any was found there, it was broken and fragmentary, or, in other words, of the character of float mixed with the slide on the surface of the mountain. It appeared, however, that plaintiff and his grantors had maintained possession of the premises from the first; had made valuable improvements on the claim, and had carried on extensive mining operations at and near the ground in controversy.

The Camp Bird and Pine discoveries were west of the ground in controversy two or three hundred feet, and, as defendant contended, on the top and apex of the lode,

which at that point extended almost directly across those locations. The defense, by answer, to the support of which many witnesses were brought into court, was that the ore in controversy was a part of the vein which defendant held by its top and apex. If what has been said to explain the position of the claims is intelligible, it will be apparent that in this view the Adelaide location extended across the vein and on its dip, below the top and apex, which was to the west of that location. And as the Adelaide location was first in time, it became a question whether a location so made, and otherwise sufficient, would be valid against a junior location on the top and apex of the vein. This having been ruled as expressed in the charge to the jury, much testimony as to the top and apex of the vein, and the continuance of the vein to the ground in controversy, was withheld, and the case stood on the validity of plaintiff's location—

Whether a vein *in place* was found in the discovery shaft of that location; and,

Whether the vein, if found there, extended to the ground in dispute.

The court charged the jury as follows:

HALLETT, D. J.

The questions to be determined on the evidence relate to the plaintiff's location, which he calls the Adelaide.

As to the work on the ground necessary to a valid location, the statute of the State provides, among other things, that a discovery shaft shall be sunk to the depth of at least ten feet, or deeper if necessary to find a well defined crevice. And the Federal statute declares that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.

The position of the plaintiff is, that Walls and Powell, the locators of the Adelaide claim, found a lode or vein in the discovery shaft sunk by them, and that position is controverted by defendant. I do not recall anything said by witnesses as to a crevice in that shaft; but there is some testimony to the effect that ore-bearing silver was found there. If you find from the evidence that such ore was taken from the Ade-

laide discovery shaft, it is important to consider whether it existed in mass and position, or, in other words, in the form of a vein or lode; or, on the other hand, in a broken and fragmentary condition, intermingled with the slide and *debris* on the surface of the mountain. For it rests with the plaintiff to show that ore was found in the discovery shaft, and also that the same body, vein or lode extends to the ground in controversy. Of course, if ore was found in the discovery shaft, and the ore so found was broken and fragmentary, it can not be said that a body of ore—a vein or lode—was found in that shaft which extends to the ground in dispute.

So that if you find that no ore was discovered in the discovery shaft of the Adelaide claim, or if ore was found in that shaft, and it was broken and fragmentary, your verdict will be for the defendant.

And in this view (that is, assuming the facts to be as stated,) the circumstance that plaintiff's grantors afterward developed the body of ore in controversy higher up the mountain side, will not affect the result. For a location rests on what may be found in the discovery shaft. And if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail.

But if a vein or lode was found in the discovery shaft of the Adelaide claim, and it extends throughout the ground in controversy, the plaintiff may prevail.

Something has been said as to whether the locators complied with the other provisions of the statute, relating to posting notice of the discovery on the claim, staking the boundaries, all of which must be shown in evidence, to constitute a valid location.

If you find these things to be proved, and that a vein or lode was found in the discovery shaft, the question remains whether such vein or lode extends to the ground in controversy. Upon the evidence here, it may come to the point whether the lode of ore found in the several shafts on the hill was also found in the discovery shaft of the Adelaide claim. Nevertheless, if you believe from the evidence that a vein or lode was found in the discovery shaft, and that it is not the same as the vein or veins found in the shafts on the same

claim, higher up the hill, but that it extends throughout the claim, the plaintiff may prevail.

This being shown, although defendant's location may appear to you to be along the line of the top, apex or outcrop of the vein, it can not prevail against a senior location on the dip of the lode. That plaintiff's location is of earlier date than either of defendants, may be assumed upon two grounds: First, the date is shown as August, 1876, and, in the absence of evidence, we can not presume that the others are of earlier date. Second, in the patent put in evidence by defendant, the Adelaide surface ground is excepted from the grant. This may be *prima facie* evidence that the Adelaide claim is of older date than the others; but it is not evidence of any thing more.

In taking the patents in that form, there was no recognition of the plaintiff's right, or the validity of the Adelaide claim; nor is the defendant in any way precluded thereby from contesting that claim.

The exception in the patent to the Pine claim to which reference has been made by counsel, does not in any way relate to the matters in controversy here. It should not have any weight whatever with you. The matters in issue are as herein stated, and you will determine them according to the rules now given you, and by the preponderance of evidence. The burden is on the plaintiff to establish every material fact, as hereinbefore declared.

The jury returned a verdict for plaintiff.

1. Title to lode discovered in tunnel: *Corning Co. v. Pell*, 4 Colo. 507; *Post TUNNEL*.

2. Denouncement, under Mexican law, is the formal declaration of discovery: *U. S. v. Castillero*, 2 Black (U. S.), 286.

3. Discovery of lode after location, validates claim: *North Noonday Co. v. Orient Co.*, 6 Saw. 299; *Post LOCATION*.

4. Discovery not valid where made within lines of prior subsisting claim: *Armstrong v. Lower*, 6 Colo. 393; *Little Pittsburg Co. v. Amie Co.*, 17 Fed. R. 57.

5. Time allowed to perfect discovery: *Patterson v. Hitchcock*, 5 M. R. —.

PACKER ET AL. V. HEATON ET AL.

(9 California, 569. Supreme Court, 1858.)

¹ **Labor upon claim by relation and intendment.** The regulations of a mining district required every claimant to work his claim two days in every ten. *Held*, that efforts to procure machinery, without which it was impossible to work the mine because of the inflow of water, should be justly considered as work done upon the claim, by relation and intendment.

² **Construction of drain.** Work done upon adjoining ground in the construction of a drain for the mine, is work done upon the claim within the true meaning of a rule requiring labor.

Interest of witness. One of a company of miners suing for possession of a claim, who has sold his interest before suit, but after the location of the claim sought to be recovered, is interested in the damages claimed and is not a competent witness.

Mistake of counsel no ground for new trial. The mistake of counsel as to the competency of a witness is no ground for granting a motion for new trial.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

A statement of the facts appears in the opinion of the court.

DUNN, SMITH & GALLOWAY, for appellants.

McCONNELL & NILES, for respondents.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

This was an action to recover the possession of a mining claim, and damages for the detention thereof. The defendants had judgment in the court below, and the plaintiffs appealed.

The main question in this case has relation to what constitutes a forfeiture or abandonment of a claim under the regulations of that particular locality. It appears that in October, 1854, certain rules and regulations were adopted at a meeting of the miners at that point, the fifth of which is as follows:

¹ See *Jackson v. Roby*, 4 Colo. L. R. 353, U. S. Sup. Court, 1883; *McGarritty v. Byington*, 2 M. R. 311.

² *Bradley v. Lee*, 4 M. R. 470; *St. Louis Co. v. Kemp*, 104 U. S. 636; *Post* PATENT.

"All claimants or companies shall work, or cause to be worked, his or their claims at least two days in every ten from the first day of May to the first day of November."

It appears that the ground in dispute was located by defendants in August, 1854, and a large amount of work done during that year, in the sinking of shafts to reach the deposits below. But from the great depth of the diggings, and the inflow of water into the shafts, it was found impossible to work the mine successfully without the aid of machinery propelled by steam. The last work upon the premises by defendants was done about the 4th of July, 1855. On the 13th of August, 1855, the plaintiffs located the claim. But between the 4th of July and the 20th of August, when the defendants re-commenced work upon the ground in dispute, they were engaged in efforts to procure the machinery necessary to prosecute their labors. At the request of the plaintiffs, the court instructed the jury, that, though the defendants were first to locate the claim, yet, if they subsequently abandoned it, and the same was located by the plaintiffs while it was so abandoned, and the plaintiffs had complied with all the rules, regulations and customs of the locality, up to the time of bringing the suit, then the plaintiffs were entitled to recover. The court refused to instruct the jury, at the request of plaintiffs, that the unsuccessful efforts of defendants to procure machinery could not avail them as an excuse for not working upon the claim as required by the rules; but, at the request of defendants' counsel, instructed them that, if the defendants were the prior possessors of the claim, and, at the time the plaintiffs located the same, were engaged in efforts to procure the necessary machinery, and did procure the same within a reasonable time, then the defendants were entitled to hold the claim against the plaintiffs.

The question as to the validity of this mining rule does not necessarily arise in this case, and we therefore express no opinion in relation to it. The instruction given by the court at the request of the defendants, though not within the strict letter of the rule, is yet within its true spirit and intent. The efforts to procure the machinery, with the *bona fide* intent to work the claim, may be justly considered as work done upon the claim, by relation and intendment. It seems that the plaintiffs were placed, substantially, in the same position with

respect to this point. They had done no work within the actual limits of the claim, but had worked upon adjoining ground in constructing a drain. The court very properly instructed the jury that this work was done upon the claim within the true meaning of the rule. The rule did not require either party to do a vain and idle thing. The owners of claims are not required to waste their labor in doing that which can lead to no practical result. It seems that one company expended their labor in procuring machinery, while the other was engaged in constructing a drain; that the work in both cases was not done upon the claim, strictly speaking; but that the end intended to be accomplished was the same, and the reasonable result the same in both cases. Both parties intended to drain the claim; and the only difference was, they used different means to attain the same end.

The court, at the request of the defendants, instructed the jury that, if the defendants were in the possession of the mining ground in dispute prior to the location of plaintiffs, and had not disposed of or abandoned the same, then they must find for the defendants.

The counsel for the plaintiffs insist that this instruction was erroneous, as it excluded the idea that the defendants could have forfeited their right to the claim.

It is unnecessary to inquire and decide whether the owner of a mining claim can forfeit the same by a failure to work upon it within ten days, as required by the rule. There was no error in giving this instruction, under the circumstances. The plaintiffs, in the first and second instructions asked by them, said nothing as to a forfeiture of defendants' right, but confined their instructions to the case of abandonment. It is true that in the fifth, sixth and seventh they referred to the specific facts as not constituting an excuse for the failure to work within the time limited. These latter instructions were properly refused, and the plaintiffs had not relied upon any other acts alleged to constitute a forfeiture. The result was, that the plaintiffs rested the case upon the ground of abandonment, and also upon certain facts not constituting a forfeiture. There was nothing in the facts proven tending to show a forfeiture. The giving of this instruction could do the plaintiffs no harm. The objection to the seventh instruction, given at

the request of defendants, was not well taken, as the instruction was, in substance, the same as the one just noticed. The ninth and twelfth instructions offered by defendants were not given by the court, as appears from the record. The letter of Kibbe is not contained in the record, and we can not judge whether its admission was error or not. The mere fact that the letter was admitted does not show error.

We think the testimony of Ballinger was properly excluded. He was a member of the plaintiffs' company during a part of the time transpiring between the date of their location on the 13th of August, 1855, and the commencement of this suit June 10, 1857. His bill of sale to the other members of the company left him interested in the damages sought to be recovered.

The court properly overruled the motion for a new trial. The verdict was not contrary to the testimony. There was no surprise on the part of plaintiffs that fair diligence could not have avoided. The mistake of counsel, as to the competency of Ballinger, was no cause for granting the motion. The objection to his competency could have been readily removed.

Upon the whole, we think that substantial justice was done, and the judgment of the court below must be affirmed.

Affirmed.

ROACH ET AL. V. GRAY ET AL.

(16 California, 383. Supreme Court, 1860.)

¹ **Mining regulations as evidence—Affecting vested rights.** In a suit for the possession of mining claims, the defendant was allowed to read in evidence the mining rules of the district, though adopted after the plaintiffs' rights had attached. *Held*, that as defendants claimed under the rules, they were competent for the purpose of determining the nature and extent of their claim, and their effect upon pre-existing rights was sufficiently guarded by the instructions.

Appeal from the Fourteenth District.

Suit for possession of certain mining claims; plaintiffs claiming under parties who located the claims in 1854. De-

¹ *Orr v. Haskell*, 4 M. R. 492; *King v. Edwards*, 4 M. R. 480.

defendants claim under a location made by them in 1858, they contending that plaintiffs had forfeited their rights by non-compliance with the mining rules of the district, adopted in December, 1856, to take effect February 1, 1857, the previous rules of 1855 being abolished. These rules were read in evidence by defendants, plaintiffs objecting.

The testimony of plaintiffs went mainly to show that they were prior locators, and had not abandoned the claims in dispute; that any interruption in working the claims was caused by want of water. The testimony of defendants tended to show that when they located, in 1858, no one was in possession or working the claims; and that defendants' failure to get water was because they would not pay for it. It was shown that defendants had, and plaintiffs had not, recorded their claims in the miners' record, and that by the mining rules failure to record forfeited the claims.

Plaintiffs asked various instructions, some of which are the ordinary instructions in ejectment, as to recovering on the strength of title, prior possession, etc. But others were, in effect, that the law neither presumes nor favors forfeiture or abandonment, but holds parties pretending to have acquired rights in consequence of such forfeiture or abandonment to strict proof; that, if plaintiffs were prevented from working the claims from want of water, and this want was caused by their inability to pay for the water, then such failure to work would not, of itself, operate a forfeiture under the mining rules; that the court passes on the question of forfeiture under the mining rules, and that the jury has nothing to do with it.

For defendants, the court gave, among others, instructions to the effect that a party can maintain his rights to mining ground by occupancy, actual or constructive; and that constructive possession can be shown only by proving compliance with the mining customs and regulations in force at the locality; that if a party claiming mining ground fails to work it within a reasonable time, the claim becomes subject to the intervening rights of others who locate and proceed to work; that where a party attempts to justify his failure to occupy and work a claim, by showing that the claim was not workable, he must prove that he was prevented working the claim by some accident, or some event not of his making, or which he might have controlled.

The jury found for defendants. Plaintiffs appeal.

J. J. CALDWELL, for appellants.

T. P. HAWLEY, for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

This is an action to recover possession of certain mining claims. The trial seems to have been fairly conducted, and the evidence was sufficient to justify the verdict. The plaintiffs asked a number of instructions, which were given by the court; and the effect of these instructions was not impaired by those afterward given at the instance of the defendants. We do not see that the plaintiffs were prejudiced by the introduction of the mining rules of the district; nor do we see any valid objection to the admissibility of these rules. It is claimed that they were adopted after the rights of the plaintiffs had attached, and that such rights could not, therefore, be taken away or affected by them. Admitting this to be true, their incompetency as evidence does not follow. The defendants claimed under them, and for the purpose of determining the nature and extent of this claim, they were not only competent but proper and necessary evidence. Their effect upon pre-existing rights was sufficiently guarded by the instructions of the court.

We see no reason for disturbing the judgment, and it is therefore affirmed.

PROSSER ET AL. V. PARKS ET AL.

(18 California, 47. Supreme Court, 1861.)

¹ **Appropriation limited.** The mining rules of a district may limit the quantity of ground which a party can acquire by location or prior appropriation.

Right to purchase unlimited. Such rules can not limit the quantity of ground he may acquire by purchase.

Appeal from the Seventeenth District.

¹ *Jupiter Co. v. Bodie Co.*, 4 M. R. 411.

Ejectment for a piece of mining ground in Sierra county, fifteen hundred feet wide by twenty-eight hundred feet in length.

On the trial defendants introduced in evidence the miners' laws of Trigaski's Flat, the district where the ground was situated; and the sections pertinent to the point made are as follows:

"Sec. 2. A claim shall consist of twenty-five feet front, and extend into the hill without limit, laid conformably to the established lines of Trigaski's claims.

"Sec. 3. Each person may hold one claim by pre-emption, and one claim by purchase, provided each purchased claim be represented during the working season."

Upon this evidence plaintiffs asked the following instruction, to wit: "The mining rules and laws which have been introduced in evidence in this case do not restrict miners in the quantity of mining ground they may locate or purchase in the mining district of Trigaski's Flat." Refused by the court, and the following instruction voluntarily given:

"The mining laws in evidence in this case limit the right of an individual to one claim of twenty-five feet by location or prior appropriation; but mining laws can not restrict the quantity of ground or number of claims which any party may purchase."

Verdict and judgment for defendants. Plaintiffs appeal.

VANCLIEF & PRATT, for appellants.

1. The legislature can not delegate to the miners of a district the power to make mining laws for that district. (Const. art. 4, sec. 1; Sedg. Stat. & Const. L. 166, 463 *et seq.*)

2. The mining laws introduced in evidence do not limit the quantity of ground a miner may locate or purchase.

H. I. THORNTON, for respondents.

COPE, J. delivered the opinion of the court, FIELD, C. J. and BALDWIN, J. concurring.

This is an action for the possession of certain mining claims. On the trial of the case, the defendants introduced

the mining rules of the district, upon the effect of which the court gave the following instruction: "The mining laws in evidence in this case limit the right of an individual to one claim of twenty-five feet by location or prior appropriation. But mining laws can not restrict the quantity of ground or number of claims which a party may acquire by purchase." The appellants contend that the first clause of this instruction is erroneous, and their counsel have placed on file a lengthy and ingenious argument in support of their position. The principle involved is not, however, an open question in this court, and we are not inclined to entertain further discussion upon the subject. Our views are fully expressed in the recent case of *English v. Johnson*, 17 Cal. 107, and it is not our purpose to depart from those views.

Judgment affirmed.

On petition for rehearing, CORE, J., delivered the opinion of the court, BALDWIN, J., concurring.

The petition for rehearing must be denied. The instruction of the court was based upon a correct interpretation of the mining laws of the district, and we are unable to perceive any valid objection to it. Petition denied.

ST. JOHN ET AL. V. KIDD ET AL.

(26 California, 264. Supreme Court, 1864.)

Objections to transcript made too late. It is too late to make technical objections to a transcript after the case is submitted upon its merits, even though such submission is made prior to the day on which the case was set for argument.

Exception taken after jury has retired. Exceptions to instructions taken after the jury has withdrawn to consider the verdict, but before the verdict is rendered, may be either allowed or refused in the discretion of the court, and no error committed.

¹**Attempt to prove two titles.** Plaintiffs attempted to derive title through two different locations, and proved a clear title under the second, without objection by defendants: *Held*, that this was sufficient to sustain a verdict for plaintiffs, and that the admission of evidence relating to the first location, even if erroneous, became immaterial.

¹ *Weill v. Lucerne Co.*, 3 M. R. 373.

¹ **Conveyance not under seal—Evidence.** A mining claim may be conveyed by bill of sale or instrument in writing not under seal, as provided by statute in California, and such instrument is admissible in evidence.

Bill of sale as evidence. It was objected to the introduction of a bill of sale in evidence, that it purported to be executed by Jones, one of the three grantors, by his attorney in fact, who, it was shown, had at the time a written power, which was not produced at the trial: *Held*, that the objection pertained, not to the admissibility of the bill of sale, but to its effect when admitted; and that it was proper evidence to show a conveyance by the other grantors.

District records as evidence of title. A book for the record and transfer of mining claims, shown to be authorized by the rules of the district, was offered in evidence, and admitted without objection, and showed several transfers by which a title to the premises in controversy was vested in plaintiffs: *Held*, that the book was at least secondary evidence, which, being admitted without objection, made out the plaintiff's case, and put the defendants to the proof of a forfeiture or abandonment by plaintiffs.

² **Forfeiture distinguished from abandonment.** The term forfeiture means the loss of a right to mine a particular piece of ground previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situate. As a defense, it is entirely distinct from that of abandonment. It involves no question of intent, which is the principal question in the defense of abandonment, but involves only the question—has the party observed the mining rules and regulations?

Appeal from the District Court, Eleventh Judicial District, El Dorado County.

In the course of the trial, plaintiffs offered in evidence the following bill of sale:

“This is to certify, that we have this day sold to Wm. St. John, the undivided one half of four claims situated on Wild Goose Flat, and known as the St. John Claims, of two hundred feet square, for the sum of two hundred and fifty dollars, the receipt of which is hereby confessed; together with the tools and sluices.

“S. J. SWEET, EARL J. BARNEY,

“D. E. JONES (by power of attorney).

“WILD GOOSE FLAT, February 7, 1857.”

Sweet, the witness, proved his own signature and that of Barney; but as to the signature of Jones, stated that at the time of the sale Jones was in the East, but Barney was his

¹ See 3 M. R. 415, Note 14.

² *Mallett v. Uncle Sam Co.*, 1 M. R. 17; *McGarrity v. Byington*, 2 M. R. 311.

agent, with written power to sell, and that Barney signed Jones' name to the bill of sale, and that witness did not know where the power of attorney was.

Defendants' attorney objected to its introduction as evidence because not under seal, and further objected to it so far as it affected the interest of Jones.

The court overruled the objection.

The other facts are stated in the opinion of the court.

P. L. EDWARDS, for appellants.

TUTTLE & HILLYER, for respondents.

By the Court, SANDERSON, C. J.

The respondents make certain technical objections to the record in this case, which come too late. The case was decided upon its merits by the late Supreme Court, and thereafter upon petition that court granted a rehearing; but after the rehearing was had the record became lost and no final decision was made. At the April term of this court the appellants, with the consent of the respondents, were allowed to file the present transcript to supply the place of the former. In view of the history of the case it can hardly be presumed that the defects insisted upon, if they existed in the old record, were not in some way disposed of before the merits were reached, either by an adverse decision of the court or an express or implied waiver on the part of the respondents. Moreover, if the case was now before the court for the first time, these objections come too late. The case was submitted upon its merits on briefs by consent of parties, without any exception being taken to the transcript, and it makes no difference that such submission was made prior to the day on which the case was set for argument. Technical objections to the transcript, not taken before the final submission of the case upon its merits, regardless of the time when submitted, must be considered as waived.

The action was brought to recover the possession of a mining claim. The plaintiffs aver title, possession and ouster in the usual form. The defendants specifically deny all the material averments in the complaint, and affirmatively aver a forfeiture and abandonment by the plaintiff under the

mining laws of the district embracing the claim, and that thereafter, finding the premises vacant and unappropriated, they lawfully entered and occupied the same. The trial resulted in a verdict and judgment for the plaintiffs. The exceptions are to the admission of evidence, and to the giving and refusing of instructions.

It is insisted by counsel for respondents that the exceptions to the instructions must be disregarded, because the same were not taken at the proper time. The record shows that the exceptions were taken after the jury had withdrawn to consider of their verdict and before the verdict was rendered. In support of this proposition *The Life and Fire Insurance Company v. The Mechanic Fire Insurance Company*, of New York (7 Wend. 31), decided at the May term, 1831, is cited. In that case, as in the present, an exception was taken to the charge of the court after the jury had withdrawn and before they had returned with their verdict. The court refused to allow the exception upon the ground that it came too late and should have been taken, if at all, before the jury had withdrawn. On appeal this action of the court below was sustained by the Supreme Court. Yet the same court, but a little more than a year afterward, at the October term, 1832, in *Wakeman v. Lyon* (9 Wend. 241), where the bill of exceptions expressly stated that the exception to the decision of the judge was taken after the verdict was delivered, said: "We will presume that the exception was taken in due time unless it is expressly shown that it was not taken until after the verdict. We do not regard the manner in which the proceedings on the trial are stated in the bill, and so we have repeatedly ruled." In *Jones v. Thurmond's Heirs* (5 Tex. 318), it was held that if there is anything in the charge of the court to which either party desires to except it is in time to indicate the exceptions as soon as the jury shall have retired, and the exceptions so indicated may be reduced to writing and signed by the judge during the term. In *Jones v. VanPatten* (3 Ind. 107), and *Roberts v. Higgins* (5 Ind. 542), it was held that exceptions to the instructions of the court must be taken before the jury render their verdict, or they will be disregarded by the appellate court. The same doctrine was

announced in *Letter v. Putney* (7 Cal. 423). While the last three cases do not directly decide the point under consideration, yet they obviously imply that an exception to the instructions of the court is well taken, if taken at any time before the verdict is rendered.

The one hundred and eighty-eighth section of the Practice Act thus defines an exception: "An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision."

This section does not in terms fix the precise time at which an exception must be taken, but it implies, we think, that the exception should be taken at the time the ruling is made, that is to say, before any further steps are taken or progress made in the trial, and in time to enable the opposite party or the court, as the case may be, to remedy the objection, if it be deemed a substantial one. The question is, doubtless, one which rests very much in the discretion of the court below, and which the district courts might regulate by a rule, as provided in the twenty-eighth section of the Judiciary Act. In the present case the court below allowed the exceptions, and we think it was not error to do so, and, had the court refused to do so, we should have been of the same opinion.

It appears from the evidence that the plaintiffs, with the exception of William O. St. John, did not seek to recover upon the ground of a location by themselves, but by virtue of a location made by others and a purchase from them. The ground seems to have been located in 1854 by Randall, Sherman, Rogers and Martin. Randall sold to Jones & Co., in December, 1854. Sweet, Barney and Jones constituted the firm of Jones & Co. What became of Sherman's, Rogers' and Martin's interest does not appear. One of the witnesses heard one Perry making a bargain with either Sherman or Rogers for his interest, but when and with what result does not appear. The ground appears to have been re-located in March, 1855, by Sherman, Perry, Jones and Will.

iam O. St. John, one of the plaintiffs in this suit. This location was entered in a book kept by the recorder of the district under the mining rules in force therein. By an entry in the same book it appears that Perry's and Jones' interests were transferred to William St. John, another of the plaintiffs in this action, on the 7th of February, 1857. By another entry in the same book it appears that Sherman's interest was transferred to William H. Dow, the other plaintiff in this action, on the 13th of January, 1860.

The exceptions taken to the admission of evidence all relate to the testimony which was offered for the purpose of proving title under the first location, and the sales thereafter made by the then locators, except the one taken to the bill of sale from Jones & Co. to William St. John, made on the 7th of February, 1857. As we understand the evidence, which we confess, as presented in the record, is somewhat obscure, this latter bill of sale is of the interest which Jones & Co. acquired under the second location, and not of that purchased by them of Randall, which he held under and by virtue of the first location. Aside from this last exception, we deem discussion unnecessary, for the reason that under the view which we take of this case the rulings of the court below upon the evidence relating to the title derived under the first location, whether erroneous or not, become immaterial, for the reason that they could not have possibly affected the verdict. So far as the plaintiffs attempted to derive title from the first location and the transfers under it, they, in our judgment, utterly failed. But under the second location, as we shall presently see, they made a clear title under the mining rules and regulations by evidence, which was not objected to by the defendants. This latter evidence is amply sufficient to sustain the verdict, so far as the question under consideration is concerned. And it is clear that the jury based their verdict upon this latter title, so to speak, and were not misled by the evidence or rulings of the court touching the former.

The exception to the bill of sale from Jones & Co. to William St. John was not well taken. The grounds of the exception were, first, that the bill of sale was not under seal; and second, that it purported to be executed by Jones, one

of the grantors, by his attorney-in-fact, who it was shown had at the time a written power, which was not produced at the trial. The first objection is answered by the statute concerning the conveyance of mining claims (Statutes of 1860, p. 175), which provides that mining claims may be conveyed by bills of sale or instruments in writing not under seal, and that all conveyances of mining claims heretofore made by bills of sale or instruments in writing not under seal, shall have the same force and effect as *prima facie* evidence of sale as if they had been made by deed under seal. The second objection does not go to the admissibility of the bill of sale, but to its effect when admitted. It was the bill of sale of Sweet and Barney, as well as Jones. Its execution by Sweet and Barney was fully proven, and that was sufficient to entitle it to admission. If its execution by Jones was not proven, counsel for the defense should have asked the court at the proper time to so instruct the jury, and direct them to disregard the bill of sale so far as it purported to convey the interest of Jones, and if the court refused, taken his exception. Such is the only way in which, under the circumstances, counsel could have made the point which he sought to make by his demurrer to the evidence. But this course was not pursued, there being no exception except to the ruling of the court admitting the bill of sale in evidence, which ruling, as we have seen, was correct.

But if there was a failure of proof as to the sale by Jones, so far as the bill of sale itself was concerned, the failure was remedied by other evidence offered by plaintiffs, which, although perhaps of a secondary character, was not objected to by the defendants, and which, in our judgment (independent of all the other testimony), not having been objected to, made a *prima facie* case for the plaintiffs, and put the defendants upon their defense. A book, to which we have before referred, purporting to be a book for the record and transfer of mining claims, and shown to have been authorized by the mining customs and laws in force in the district where the claim in controversy was situated, was offered in evidence by the plaintiffs, and admitted without objection on the part of the defendants. From this book three entries were read to the jury by the plaintiffs. The first showed a location of

the ground in question on the 10th of March, 1855, by Sherman, Perry, Jones, and William O. St. John, one of the plaintiffs. The second showed a transfer by Perry and Jones to William St. John, another of the plaintiffs, on the 7th of February, 1857. The third and last showed a transfer by Sherman to Dow, the only remaining plaintiff, on the 13th of January, 1860. Thus, the title or right acquired by the second location on the 10th of March, 1855, according to this book, became vested in the plaintiffs prior to the alleged entry and ouster of the defendants, which took place on the 20th of March, 1860. This book was at least secondary evidence of the appropriation of the ground and its conveyance to plaintiffs, and not being objected to on the ground that it was secondary, of itself made out the plaintiffs' case under the mining laws of the district, and put the defendants to the proof of the plaintiffs' forfeiture or abandonment under the same.

We now come to the exceptions to the giving and refusing of instructions.

The defendants relied upon an alleged forfeiture or loss of the right to mine the ground on the part of the plaintiffs, if they had ever acquired such a right, by a failure to work the ground, and keep the right alive, as required by the mining rules and regulations in force in the district. And that, by such neglect and failure on their part, the ground, at and prior to the defendants' entry, had become again, as it was prior to the location under which plaintiffs claimed, *publici juris*, and open to their occupation. In support of this defense, the book before referred to, containing the rules and regulations of the district, was offered in evidence by the defendants, accompanied with testimony tending to show that plaintiffs had failed and neglected to comply therewith, and had therefore failed to keep alive their alleged right to mine the ground in question.

Without noticing in detail the instructions of the court, it is sufficient to say that the jury were instructed in effect that if they found from the evidence that the plaintiffs had acquired a right to mine the ground in controversy prior to the entry of the defendants, that right could not be divested by a non-compliance on their part with any rules or regulations adopt-

ed by the miners; but that such rules and regulations might be considered by them in connection with the other evidence for the purpose of determining whether or not the plaintiffs had abandoned their claim. We understand the learned judge of the court below to have here used the term forfeiture in its mining law sense, and the word abandonment in its common law sense. Such being the case, the jury were, in effect, instructed that there was not, and could not be, any such thing as a forfeiture under mining rules and regulations, and if so, the instruction was undoubtedly erroneous.

The term forfeiture as used in our mining customs and codes means the loss of a right to mine a particular piece of ground previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated, prescribing the acts which must be done in order to continue and keep alive that right after it has been once acquired. As a defense it is entirely distinct and separate from that of abandonment. It involves no question of intent, but rests entirely upon the mining rules and regulations, and involves only the question whether, in point of fact those rules and regulations have been observed by the party seeking to maintain or perpetuate the right, regardless of what his intentions may have been. Whereas the principal question involved in the defense of abandonment is one of intention. Was the ground left by the locator, without any intention of returning or making any future use of it? If so an abandonment has taken place upon common law principles, independent of any mining rule or regulation, and the ground has become once more *publici juris* and open to the occupation of the next comer.

That the miners may make rules and regulations to govern the acquisition and tenure of mining rights has been expressly, and in our judgment, wisely declared by the legislature, with the further declaration that such rules and regulations shall be admitted in evidence and shall control the decision of mining controversies (Pr. Act, Sec. 621): ¹ *Morton v. The Solambo Min. Co.*, decided at the present term.

Judgment reversed and new trial ordered.

¹ 4 M. R. 463.

MORTON V. THE SOLAMBO COPPER MINING Co.

(26 California, 527. Supreme Court, 1864.)

- ¹ **Usage and custom confined to the district.** Questions affecting a mining right should be solved according to the customs and usages of the bar or diggings embracing the claim, *whether written or unwritten.*
- ² **Locator can not oust co-tenant by posting new notice—Vested rights of associates.** A mining custom which provides that any person who has discovered a vein or lode, and desires to locate a mining claim upon it for himself and others, may do so by putting up a notice, with his own name and the names of those whom he may choose to associate with him appended thereto, designating the extent of his claim, which may amount to 300 feet for himself and 150 feet for each of his associates, is a good and legal custom, but such discoverer can not afterward deprive his associates of their interest by tearing down their names and substituting the names of others.
- ³ **Location by agent.** The law makes the discoverer the agent of those for whom he chose to act, and makes his act their act, regardless of whether they have any knowledge of it or not.

Appeal from the District Court, Fifth Judicial District, Tuolumne County.

The facts are stated in the opinion of the court.

G. F. & W. H. SHARP, for appellant.

A mere mining usage, not established or sustained by a written mining rule, can not have the force of law so as to vest property.

There was no proof that, by the unwritten custom or usage, the *effect* of simply placing a name upon a notice was to vest property in the person bearing that name; in the absence of such proof, it was error to give such effect to the writing of the *name only*.

The unwritten custom or usage proven required expressly, *in order to vest property or acquire a right*, that there must be a compliance with the condition of then "entering upon and working such vein or lode."

There was no proof as to what power the locator had over names used by him. Upon principle, if he could *insert* a name in a notice, surely he must have the power to *erase* it. *Quoad*

¹ *Table Mt. Co. v. Stranahan*, 31 Cal. 387; *Post* LOCATION.

² *Chase v. Savage Co.*, 2 Nev. 9; *Post* LOCATION.

³ *Murley v. Ennis*, 2 Colo. 300; *Post* PROSP. CONTRACT.

the notice, he is *dominus rerum*. Especially could he erase the names of Vigoreux and Reviere, for he inserted them *without authority*: *Anderson v. Coonley*, 21 Wend. 279; Story on Agency, 126, 127.

There was *no acceptance* by Amy, Vigorenx or Reviere.

Until *acceptance* and *consent* of the person whose name is used, such person does not acquire property: *Hannah v. Swarner*, 8 Watts 11. Mutual consent is necessary to a gift, even: 2 Kent, 438.

Amy acquired *no title*; because, though any acceptance would be a compliance with *common law* rule, yet the unwritten usage relied on by respondent required him (by himself or by another) to *enter and work*, as the *sole evidence* of acceptance.

Vigoreux and Reviere did not accept, even by parol, and no presumption of their intention to accept can arise, especially when the right is acquired only by compliance with the onerous condition of entering and working.

The proof showed that they had no knowledge even, of their names being thus used, and the whole thing was without any authority from them. Neither on the principle of agency, nor of grant, can Vigoreux and Reviere be held to have acquired anything.

This case differs from that of *Gore v. McBrayer*, 18 Cal. 585, for Gore authorized McBrayer to locate for him; here Vigoreux and Riviere gave no authority to Dejon, and there was no proof of ratification by their adopting, or in any manner recognizing the act of Dejon before the right of these defendants attached.

H. P. BARBER, for respondent.

The right to a mining claim vests by taking, in accordance with local rules, and the custom of miners in such case is entitled to great if not controlling weight: *McGarrity v. Byington*, 12 Cal. 431; *Brown v. Forty-nine Quartz M. Co.*, 15 Cal. 161.

The placing of the names of plaintiffs (or their grantors) upon the notice by Dejon, together with his own, and his entry upon and working the mine, gave all parties whose names were so placed on said notice, a *vested interest* as tenants in

common therein, and no act of Dejon could subsequently affect their interest. This principle is expressly recognized in *Gore v. McBrayer*, 18 Cal. 582, 587.

The placing of their names on the notice gave plaintiff a *vested right* under the mining rules, and until they rejected or abandoned it (which of course they could not do before knowledge of the fact) their co-tenants could not divest them of their rights.

The fact that Dejon was the discoverer, and placed these names up, gave him no superior right to any other co-tenant. It was not in the nature of a gift, which might be revoked before actual delivery (even if placing the names on the notice was not in fact a *quasi-delivery* of seizin), because Dejon had not a foot of ground to *give* them. His power was derived *solely* from the mining usages of the vicinity, and after he had once publicly chosen his associates in the manner prescribed by those usages, the *power* under which he acted became extinct.

The action of Dejon in erasing these names and substituting others was fraudulent, and therefore void: *Sanford v. Head*, 5 Cal. 298; *Clark v. Underwood*, 17 Barb. 202.

Appellant contends that a mere mining usage, unless sustained by a *written rule*, can not vest property. The Practice Act (Sec. 621) provides that in mining cases the *customs, rules, and regulations* shall govern the decision of the action. See, also, *Gore v. McBrayer*, 18 Cal. 582.

Appellant contends that it was necessary for *plaintiff himself* to work the claim.

It was sufficient if Dejon, the discoverer, plaintiff's co-tenant, worked the common claim, and the record is express as to this point. The possession and working by one co-tenant is a possession and working by all: *Waring v. Crow*, 11 Cal. 371.

By the Court, SANDERSON, C. J.

This action was brought to recover an undivided interest in a copper mining claim, called the Solambo claim. The plaintiff recovered judgment in the court below, and the defendant appealed. The case comes before us upon the following statement:

“On the trial it was proven that, at the time of the location of the Solambo claim, the mining customs, usages and regulations in force in the mining district where said claim is located (there being no written mining laws), adopted and in use in locating such claims, were: That the discoverer placed up a notice on the vein or lode, claiming the same for himself and such persons as he thought proper to place with him on the notice, in the proportion of three hundred feet for the discoverer and one hundred and fifty feet for each of the parties so associated with him on said notice, and then entering upon and working such vein or lode. That on or about the 26th day of January, 1863, Joseph Dejon, the discoverer of said lode, in accordance with said mining customs, usages and regulations, located a copper vein or lode, placing thereon the following notice:

“‘No. 1—Discovery Claim, Solambo Lead.—We, the undersigned, claim three thousand nine hundred feet in this copper lode, running one thousand nine hundred feet northwest and one thousand nine hundred and fifty feet south-east from this notice, with all dips, angles and spurs, the lode being three thousand and nine hundred feet in length, and five hundred feet on each side of the lode.’

“To this notice, Joseph Dejon, the discoverer, appended his own name, with sufficient other names to make up the amount claimed in parcels of one hundred and fifty feet each, and afterward placed said notice, so containing said names, on the lode, entered, took possession of, and worked the same. Among the names so placed by Joseph Dejon on said notice, were those of Victor Amy, Joseph Vigoreux and Victor Reviere, grantors of the plaintiff, and comprising three shares of one hundred and fifty feet each, or four hundred and fifty in all.

“The name of Victor Amy was placed on said notice by his permission and consent. The names of the other parties were placed upon said notice without their knowledge, and Dejon had no authority to use their names from any of them except Victor Amy.

“After the claim had been so located by said Dejon and said notice had remained thereon a few days, and before the aforesaid parties, except Victor Amy, knew that their names

were on said notice, Joseph Dejon took down and destroyed said original notice, and placed up another claiming the same ground but omitting the names of all the foregoing parties and substituting others in their stead.

“The parties so substituted transferred their alleged interest to defendant, who took exclusive possession, refusing to permit said parties above named whose names were first placed on the notice by Dejon to enter upon the claim, or to recognize them as having any right therein.

“Said first named parties transferred their respective interests to plaintiff. On the trial, the court charged the jury as follows: ‘That if they believed from the evidence that Dejon was the discoverer of the lode in question, and had located the same in accordance with the mining customs of the district, by placing upon said lode a notice such as had been given in evidence, and containing the names of plaintiff’s grantors thereon, and had entered upon and worked the same thereunder, such location and entry, in point of law, gave said parties whose names were so placed on said notice a vested right as tenants in common in said lode, and said Dejon had no right afterward, without their knowledge or consent, to tear down the first notice and place up another omitting their names. That such conduct on his part did not destroy any right they acquired by the mining customs under said location, and that unless it was shown that such alteration was made with the knowledge or consent of said parties, it could not affect their rights; and they would be entitled to recover to the extent of their respective interests.’

“To this instruction defendant’s counsel then and there excepted, and now assign the same as error.”

The six hundred and twenty-first section of the Practice Act provides that, “In actions respecting ‘mining claims’ proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages, or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action.”

At the time the foregoing became a part of the law of the land, there had sprung up throughout the mining regions of the State, local customs and usages, by which persons engaged

in mining pursuits were governed in the acquisition, use, forfeiture, or loss of mining ground. (We do not here use the word forfeiture in its common-law sense, but in its mining-law sense as used and understood by the miners who are the framers of our mining codes.) These customs differed in different localities, and varied to a greater or less extent according to the character of the mines. They prescribe the acts by which the right to mine a particular piece of ground could be secured and its use and enjoyment continued and preserved, and by what non-action on the part of the appropriator such right should become forfeited or lost, and the ground become, as at first, *publici juris* and open to the appropriation of the next comer. They were few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the legislature, not only not to supplant them by legislative enactments, but, on the contrary, to give them the additional weight of legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. Having received the sanction of the legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form. And it is to be regretted that the wisdom of the legislature in thus leaving mining controversies to the arbitrament of mining laws has not always been seconded by the courts and the legal profession, who seem to have been too long tied down to the treadmill of the common law to readily escape its thralldom while engaged in the solution of a mining controversy. These customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the State; and, however it may have been heretofore, there is no reason why judges or lawyers should wander, with counsel for appellant

in this case, back to the time when Abraham dug his well, or explore with them the law of agency or the statute of frauds in order to solve a simple question affecting a mining right, for a more convenient and equally legal solution can be found nearer home, in the "customs and usages of the bar or diggings embracing the claim" to which such right is asserted or denied.

The only question for us to determine in the present case is whether the instruction of the court contains a correct exposition of the mining rule or custom under which the Solambo claim was located, for that custom contains all the law applicable to the question before us, and by it the question is to be solved whether the custom is written or unwritten, without any reference to the statute of frauds or the law of agency, except as declared in the custom itself.

The custom provides that any person who has discovered a vein or lode and desires to locate a mining claim upon it for himself, or for himself and others, may do so by putting up a notice, with his own name and the names of those whom he may choose to associate with him appended thereto, to that effect, designating the extent of his claim, which may amount to 300 feet for himself and 150 feet for each of his associates. Thus the law itself makes the discoverer the agent of those for whom he chooses to act, and makes his act their act, regardless of the fact whether they have any knowledge of it or not. The discoverer can only locate 300 feet for himself; and if he locates more, he can only do so as the agent of another; and having located for another, his power as agent ceases, for beyond the act of location the custom does not authorize him to proceed as agent, and he can thereafter make no change without power to do so from the person whose name he has so used. The act of location being accomplished in the manner designated, the discoverer becomes vested with a mining right to the extent of an undivided 300 feet and no more, and each of his associates with an undivided 150 feet, and thereafter they hold the claim as tenants in common, provided that the discoverer or some of them enter upon and work the same. It follows that the instruction was correct, and the judgment must be affirmed.

We can not leave this case without commending the man-

ner in which, the statement has been prepared. It is a good example of what every statement ought to be, and we have copied it into this opinion in part for the purpose of calling the attention of the profession to it. We have copied the entire statement except the authentication. By adopting the course taken in the preparation of this statement, instead of inserting the testimony bodily, as many do, much useless labor will be saved to the court and counsel, and much expense to litigants.

Judgment affirmed.

BRADLEY ET AL. V. LEE.

(38 California, 362. Supreme Court, 1869.)

Instructions to jury are to be read together. An instruction given for the purpose of presenting the law upon a point arising upon more than one fact seldom contains all the qualifications that would be necessary if no other instruction were given; but it is always intended that such instruction shall be read, together with the other instructions upon the same point.

¹ Annual labor—Contiguous claims. A rule of a mining district in Nevada county, California, reading as follows: "That when two or more separate sets of claims and separate locations lie immediately contiguous to each other, any and all work and labor expended upon any one set of contiguous claims is considered work upon them all, and will hold them all under the unwritten local customs." *Construed* to mean that \$100 in value, or twenty days of faithful labor performed upon one set of claims, is sufficient to hold for one year *all* the contiguous sets of claims owned by the same party.

Facts assumed in instructions, when no error. It is no ground for error that an instruction assumed that the defendant was the agent of the E. M. Co., even though the evidence did not fully warrant such assumption, provided it was not productive of any injury to plaintiffs.

¹ Relocation while in possession of others—Instruction construed. An instruction of the court below directed the jury to find for the defendant if they believed that the E. M. Co. located the claims "at a time when they were open and subject to appropriation under the local usage of the district": *Held*, that this instruction did not imply that a relocation based upon a failure to perform work under such local rules, could be made while a party was in actual possession of the claim. Per SPRAGUE, J., dissenting:

¹ *Packer v. Heaton*, 4 M. R. 447.

² *Slavonian Co. v. Perasich*, 1 M. R. 541.

Erroneous assumption in instructions. An instruction which assumes as a fact established one of the issues tendered by the pleadings, or which assumes that an outstanding title in a stranger will defeat plaintiff's right to recover possession of a mining claim, is erroneous.

Outstanding title no defense to action for possession. The rule that plaintiff must recover upon the strength of his own title does not apply to actions for the recovery of the possession of a mining claim, and proof of outstanding title is no defense to such action, unless the defendant connects himself with it.

Annual labor—Contiguous claims. The local rule above quoted: *Held*, to mean that the amount of work required to be done must, in the aggregate, be equivalent to twenty days, or \$100 expended for *each* set of claims located.

Contradictory instructions. An instruction which seems to submit to the jury the construction of a custom which, in a previous instruction, had been construed by the court, tends to nullify the construction of the court and to confuse the jury.

Appeal from the District Court of Nevada County, Fourteenth Judicial District.

The opinion states the case.

JOHN W. DWINELLE, for appellants, who were plaintiffs below.

The fifth instruction was erroneous in several respects:

First—It assumed that the said modifications of the mining laws had been adopted before the time of the alleged forfeiture of the original locators was said to have operated; whereas the instruction should have been accompanied with the qualification, "provided the said modified laws were previously, and at the time, in force": *Table Mountain v. Stranahan*, 31 Cal. 387.

Secondly—It assumes that the requisition of one hundred dollars in value, or twenty days of faithful labor upon the location by the Empire Company of said claims, in conjunction with other claims held by them, and lying immediately contiguous thereto, was sufficient to hold all of said claims; whereas the true construction is, that one hundred dollars in value, or twenty days in labor must be expended, or worked out *for each respective claim*; although, if the claims are contiguous, the *whole aggregate amount* may be worked out on any one of the contiguous claims for the benefit of the whole.

Thirdly—It assumes, conclusively, as a matter of fact, that a location by the Empire Company inured as a defense to the

defendant; whereas the statement shows only that evidence was given *tending to show* that the defendant, in ejecting said locators, acted as the agent of the Empire Mining Company. The charge, therefore, assumed to decide one of the questions of fact which was in issue before the jury, and to connect the defendant absolutely with the Empire Mining Company. And even if the Empire Company could justify themselves, that would not authorize the jury to justify the defendant, unless they were positively connected with them: *Richardson v. McNulty*, 24 Cal. 339.

Fourthly—The court assume, as matter of fact, the mining custom to have been that one hundred dollars in value, or twenty days labor in each year, must be performed on the claims; whereas, *evidence only* was given on that point, of the sufficiency of which the jury was to judge.

Fifthly—The said fifth instruction assumes that mining claims are open and subject to appropriation in case the local mining laws in relation to working them are not observed; whereas, in truth, the local mining laws provide only one mode of giving constructive notice of possession; and, even if lands “are open and subject to appropriation under the local usages of the district,” but are yet in the actual possession of private persons, such possession overrides any rights supposed to be derived from local usages, and prevails to the benefit of the possessors: *Hess v. Winder*, 30 Cal. 349.

In this case it appears that evidence was given tending to show that at a certain time the plaintiffs, or their grantors, located these lands as a mining claim, and were still in possession of five sixths of the lands when they were ejected by defendant.

Whether or not they were so in possession at the time of the alleged relocation, does not appear; but the charge excepted to contains no exception or provision to meet that category.

A. A. SARGENT, for respondent.

RHODES, J., delivered the opinion of the court.

The fifth instruction, given at the request of defendant, is as follows: “Fifth—If the jury believe, from the evidence, that

the claims in dispute are adjoining other mining claims and possessions of the Empire Mining Company, or Ophir, or Rich Hills, and that the Empire Mining Company or its grantors located the same at a time when they were open and subject to appropriation, under the local usages of the district, and have, during each and every year since said location, including the year in which they were located, performed upon said claims, or upon claims previously held by them, lying immediately contiguous thereto, labor of the value of \$100, or twenty days of faithful labor, then the jury must find for the defendant."

It is objected to this instruction, that it assumes that the modifications of the mining laws, mentioned in the record, had been adopted before the time of the alleged forfeiture by the original locators. The instruction is not, and does not profess to be, a complete charge upon the legal questions to which it relates. It seldom occurs that a single instruction, given for the purpose of presenting the law upon a point arising upon more than one fact, contains all the qualifications and provisos that would be necessary, if no other instruction were given; but it is always intended that such instruction shall be read, together with the other instructions upon the same point, or those involving a consideration of the same facts. Reading this instruction, with the others given in the case, the question is submitted to the jury, whether the plaintiffs failed, during any year after their location, to perform the amount of labor upon the claims required by the mining laws then in force. It also submits the question whether the claims "were open and subject to appropriation under the local usages of the district." The question of the performance of labor upon the claims by the Empire Mining Company, in accordance with the mining laws, was also submitted to the jury. It might have been, technically, more accurate to have submitted, in this instruction, the question as to the amount of labor required by the mining laws to be performed; but it was not necessary, as the jury were fully charged with that inquiry.

It is further objected that the instruction misconstrues the mining laws in regard to the amount of labor required to be performed, when the same party owns two or more contiguous

sets of claims. But we think the construction given by the court below, to the effect that work upon one set of claims is, by the mining laws, declared work upon all of such sets of claims; that \$100 in value, or twenty days of faithful labor performed upon one set of claims, is sufficient to hold for one year all the contiguous sets of claims owned by the same party. The law does not limit the number of locators in a set of claims, and consequently does not limit the extent of the set of claims. Suppose that one party owns three sets of contiguous claims, of five hundred feet each, and another party owns one set of claims, of the extent of three thousand feet, would it not be unreasonable to hold, when the letter of the law does not require it, that the first party must perform three times—and, in view of the extent of the claims, six times—the amount of labor required of the other party? Should the first party perform in one year forty or more, but not sixty days labor, and should all the work be actually expended upon only one of the three sets of claims, each of the three sets of claims would be subject to relocation, if the law requires him to perform twenty days labor for each set of claims. For the law declaring that “all work and labor expended upon any one set of contiguous claims, is considered work upon them all,” the work performed must be applicable to each set of claims, in the same manner and to the like extent, and he would thus come short of twenty days labor upon either claim. If the law considers the work performed on any set of claims as “work upon them all,” the owner has not the right to shift the work, by mere assertion, from one set of claims to another, as his caprice or interest may dictate.

It is also objected that the instruction assumes as a fact, that the defendant was acting only as the agent of the Empire Mining Company. It is apparent that the real contest in the case was between the plaintiffs and the Empire Mining Company; and it is stated in the record that the defendant gave evidence tending to show “that the said defendant, in ejecting said locators, acted only as the agent of the said Empire Mining Company,” and it is not stated that there was any evidence to the contrary. It is also stated that the “defendant introduced evidence tending to show that from the year 1857 to the year 1865 the Empire Mining Company, of which

the defendant, Lee, is the managing agent, was in the open and undisturbed possession of the said mining ground," etc. In view of this admission and the condition of the evidence in the case, the assumption in the instruction, that the defendant was acting as such agent, if not fully warranted, was not productive of any injury to the plaintiffs.

It is further objected to the instruction, that it assumes as a fact, that the mining customs required the performance of work to the amount of \$100, or twenty days, on the claims each year. But the question as to the amount of work required by the mining customs to be performed upon mining claims, was submitted to the jury in another instruction.

The fifth objection to the instruction is, that it assumes that mining claims are open and subject to appropriation in case the mining laws in relation to working them are not observed, although they may be in the actual possession of other persons.

The language of the instruction, "open and subject to appropriation under the local usages of the district," does not, necessarily, imply that a mining claim, in the actual possession of a person, may be relocated by another person, if the person in possession has not performed the amount of work on the claim required by the mining regulations in order to give him the constructive possession of the claim. Such regulations are devised for the purpose of enabling persons who locate claims to hold them by constructive possession; and they are not to be construed as authorizing a person to invade the actual possession of another on the pretext that the latter has neglected to perform the requisite amount of work, or has failed, in some other respect, to comply with such regulations. Such constructive possession is no higher evidence of title than actual possession. We do not construe the instruction as laying down a rule opposed to this view of the purpose of mining rules and customs.

The plaintiffs gave evidence tending to show that their grantors located the claims in 1855, "according to the customs, usages and regulations" then in force; that the first year thereafter they did the requisite amount of work to enable them to hold the claims; "that certain of said locators were in possession of five sixths of said claim, and were

ejected therefrom, by said defendant, in September, in the year 1865." There is no evidence tending to show that they were in the actual possession at the time of the alleged relocation of the claim, nor at any other time than in September, 1865—even if it is meant by the statement that at that time they were in the *actual* possession. There was, therefore, nothing in the evidence which required the court to charge the jury as to the effect of an actual possession by the plaintiffs' grantors at the time of the alleged relocation of the claim by those under whom the defendant claims.

The objections to the second and fourth instructions need not be particularly noticed, as they have been sufficiently answered in considering the objections to the fifth instruction.

Judgment affirmed.

SPRAGUE, J., filed the following dissenting opinion:

This is an action of ejectment, to recover the possession of a tract of land as a quartz mining claim.

Plaintiffs allege ownership and possession of the premises on the 17th of May, 1866, and that on that day the defendant, S. W. Lee, "unlawfully, and without right of title, entered into and upon the same, and ousted the plaintiff therefrom, and wrongfully withholds the possession thereof from plaintiffs."

The defendant's answer denies the ownership and possession of plaintiffs, and alleges as substantive matter of defense that the premises in controversy were, at the time of the commencement of the suit, and for more than nine years theretofore had been, the property and in the possession of the "Empire Mining Company," a corporation; and that the said Empire Mining Company still is the owner, in possession, and entitled to the possession thereof; "and that all the possession, ownership and acts done by the said defendant, S. W. Lee, were and are by virtue of the ownership of the said Empire Mining Company, and as the manager and acting agent thereof."

The cause was submitted to a jury upon the evidence, under instructions by the court, as asked by the respective parties, and a general verdict was rendered in favor of defend-

ant; whereupon judgment was entered by the court in favor of defendant, and against plaintiffs for costs.

All the instructions of the court to the jury appearing in the record, were given at the request of the parties; three at request of plaintiffs, numbered first, second and third, and eleven at request of defendant, numbered respectively first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth, and plaintiff duly excepted, at the time the same were given, to the second, third, fourth and fifth instructions given at request of defendant.

The appeal is from the judgment, and the giving the above instructions second, third, fourth and fifth, at request of defendant, constitute the errors specified by plaintiffs in their statement on appeal.

The second instruction given at request of defendant assumes as a fact established, one of the issues tendered by the pleadings, or else it assumes that an outstanding title or right of possession in the Empire Mining Company, as between it and plaintiffs, will defeat the plaintiffs' right of recovery as against defendant, S. W. Lee, either of which assumptions in an instruction is error, and presumptively misled the jury to the prejudice of the plaintiffs.

The instruction reads as follows: "If the jury believe from the evidence that after the lapse of more than one year from the time of the last work done by plaintiffs upon the claims in dispute, the defendant, or Empire Mining Company, or its grantors, entered upon such claims and relocated the same under the local customs governing the taking up of quartz mining claims, and have ever since then continued to hold and occupy the same, and to work the same in accordance with such local usages, the jury must find for defendant—provided that the jury believe from the evidence that the mining customs of the district in which the ground in dispute is situated, required the expenditure of one hundred dollars worth of labor or twenty days work, on each set of claims in each year, and that under such customs the failure to make such expenditure for the space of one year subjected the claims to relocation."

The defendant had, in his answer, alleged as substantive matter of defense, ownership, possession, and right of pos-

session of the demanded premises in the Empire Mining Company; and that in his entry upon, and ouster of plaintiffs from the premises, he acted in behalf of and as the agent of the Empire Mining Company. Evidence was introduced by defendant, tending to establish the relation and connection of defendant with the Empire Company, as by him alleged, and whether such relation and connection was so actually established by the evidence, was a material question of fact to be left to the jury: *Cahoon v. Marshall*, 25 Cal. 197; *Preston v. Keys*, 23 Cal. 193.

This action involves the right of possession of the demanded premises, as between plaintiffs and defendant, S. W. Lee; and plaintiffs rely solely on prior possession; hence, proof of an outstanding right of possession in the Empire Mining Company can not avail defendant as a defense to the action, without connecting himself with such outstanding right of possession in the manner alleged in his answer; and whether this connection was so established by the evidence, should have been submitted to the jury.

In actions for the recovery of the possession of mining claims upon public lands, where neither party claims the title in fee but only relies upon possessory right, the superior right prevails, and the rule that plaintiff must recover upon the strength of his own title, and that proof by defendant of an outstanding title in a stranger will defeat recovery by plaintiff does not prevail, as in action of ejectment, where the strict legal title is litigated: *Bird v. Liebros*, 9 Cal. 1; *Hubbard v. Barry*, 21 Cal. 321; *Richardson v. McNulty*, 24 Id. 339.

If the Empire Mining Company had desired in this suit to contest with plaintiffs the right to the possession of the premises in controversy, it should have taken the proper steps to have the corporation substituted as defendant in place of Lee. This does not appear to have been done or attempted: hence the Empire Mining Company is a stranger to these proceedings.

The fifth instruction, given at request of defendant, to which exception was taken, and now assigned as error, is obnoxious to the same objection in the above particulars as the second.

The fourth instruction, given at request of defendant, I think gives an erroneous construction of one of the admitted "customs, rules and regulations" of the mining district in which the demanded premises are located. This rule and custom, as admitted, reads as follows: "That when two or more separate sets of claims and separate locations lie immediately contiguous to each other, any and all work and labor expended upon any one set of contiguous claims is considered work upon them all, and will hold them all under the unwritten local customs."

The construction given to this mining rule or custom in the fourth instruction is as follows: "The jury are instructed that under the local customs and usages admitted in evidence, and agreed to by the respective parties to this action, two or more separate sets of claims or separate locations lying immediately adjoining each other, and owned by the same party, are to be considered and may be held as one claim or location, and that all work and labor expended upon any one set or portion of such contiguous claims is to be considered work upon them all, and will hold the entire tract embraced in such separate locations under the unwritten local customs aforesaid."

As I understand and construe the above admitted rule or custom, its evident import and meaning is, that where several distinct locations or sets of claims are contiguous to or adjoining each other, and all are owned or held by the same person or party, work upon one set is considered work upon all, and that the amount of work required to be done upon the one set, in the aggregate, must be equivalent to twenty days, or \$100 expended for each set of claims so owned and located. This same error of construction is repeated and directly applied in the fifth instruction, by declaring that twenty days or \$100 worth of work done on any one set or contiguous sets of claims owned by the same party is a compliance with the custom, and sufficient to hold all.

Again, the latter clause of the second instruction given at request of defendant seems to submit to the jury, upon the evidence, the construction of an admitted custom, which had been previously determined by the court in the last paragraph of the first instruction given at request of plaintiffs,

and evidently had a tendency to nullify or destroy the effect of that clause of the first instruction given at plaintiffs' request, and confuse the jury upon a question material to plaintiffs. I, therefore, am of opinion the judgment should be reversed and cause remanded for a new trial.

SANDERSON, J., expressed no opinion.

Judgment affirmed.

KING ET AL. V. EDWARDS ET AL.

(1 Montana, 235. Supreme Court, 1870.)

Mining customs—Conditions, precedent and subsequent—Forfeiture.

The mining customs of any particular mining district are the common law of mining. Compliance with the customs which point out the manner of locating mining ground, is a condition precedent, and the regulations which require that so much work must be performed upon each claim are conditions subsequent which must be complied with, or the claim be forfeited to the United States. It is not necessary that the law should provide in terms for such forfeiture.

Forfeiture considered as aiding development. The condition of development should be attached to every mining claim. The policy of the government is to encourage the extraction of the precious metals, and courts should maintain that construction of mining customs which will accomplish this end. This policy considered with relation to enforcing forfeitures.

Custom, a question for a jury—Law of other districts. The issue as to what customs are in force in a district is properly left to the jury, and the customs of an outside district can not be introduced to vary them.

¹ **Written law presumed in force—Contrary custom may be shown.**

When the written laws of a district provide for work in the district to represent mining ground therein, these laws are presumptively in force, and parties who claim to represent their ground by work outside of the district, must show a positive custom sanctioning such representation.

Change of boundaries. The boundaries of a mining district may be changed, but such change can not interfere with rights vested under district rules existing before the change.

² **Customs must be reasonable—Representation by work on flume in another district.** All mining customs must be reasonable; and where it appears that mining ground could not be profitably worked without going outside the district to run a bed-rock flume to it, a custom which would require work to be done in the district to represent it, might be considered unreasonable.

¹ *Jupiter Co. v. Bodie Co.*, 4 M. R. 411; *Harvey v. Ryan*, 4 M. R. 490.

² *Packer v. Heaton*, 4 M. R. 447.

Appeal from the Third District, Meagher County.

In May, 1869, King and Gillett filed their complaint against Edwards and ten others, including John Doe and Richard Roe, in the District Court in Meagher County. The cause was tried by a jury in November, 1869, before SYMES, J., and a verdict was returned for defendants. The facts are stated in the opinion.

WOOLFOLK & TOOLE, for appellants.

CHUMASERO & CHADWICK, for respondents.

KNOWLES, J.

This is an action of ejectment brought by the appellants to recover possession from the respondents of certain mining ground, situated in German district, Confederate gulch, Meagher county.

The appellants claim title from those who first located the same. The respondents claim that appellants forfeited the ground and set up title in themselves.

The law which requires work to be done on mining ground in German district does not provide that a failure to comply therewith shall work a forfeiture of the ground.

The first question presented for us to answer is, whether it is necessary for this law to so provide in order to have this effect.

The mining customs of any particular mining district have the force and effect of laws, in other words, are laws. The local courts in each one of the States and Territories where placer mining is prosecuted to any extent, have so recognized them, and finally, Congress, by an act in July, 1866, recognized these rules and customs as law.

The title to mineral lands is vested in the United States. Any citizen of the United States, or any person who has declared his intention to become such, may, by complying with the local rules and customs of any district, become vested with the right to possess and mine any specific portion of mining ground. The customs which point out the manner of locating mining ground are conditions precedent. A substan-

tial compliance with them is necessary. The right to possess and mine any mining claim is derived from the United States by virtue of this compliance. The United States is divested of this right as effectually as if these rules and customs were acts of Congress, for they now are the American common law on mining for precious metals.

The regulations of miners which require that so much work must be performed upon each claim are conditions subsequent. The locator of a mining claim takes subject to this condition. So long as he complies with it, the right to possess and mine the same remains with him. Whenever a condition subsequent is attached to any right or title vested in a party by virtue of law, it is not necessary that the law should provide that a failure to comply therewith works a forfeiture of the right. Even when a condition subsequent is expressed in a deed, it is not necessary that it be specified that a failure to comply with it entitles the grantor to enter and take possession of the tenements. It is implied that he has this right: 4 Kent's Com. 140.

It is true that where a mine is forfeited, it becomes forfeited to the United States, of whom the locator derived title. Formerly only the grantor, or his heirs, could proceed for forfeiture; but under the law, as it now stands, an assignee of the rights of the grantor can proceed to declare a forfeiture: 4 Kent's Com. 138, 139.

When mining ground is forfeited by any one, it again becomes unappropriated mineral land of the United States. Any one who relocates it, in accordance with the mining rules and customs of the district in which the same is situated, has the rights of the government, and may proceed to declare a forfeiture, or may set up the defense of forfeiture in an action against him.

From the statement in this case, it would seem that it is conceded that both parties claim by virtue of the local rules and customs of the district where the ground is situated. At all events, as far as the statement goes, they both stand upon the same footing. It is doubtful whether any person could acquire and possess a mining claim, without complying with the local rules and customs upon that subject, since the act of Congress of July, 1866, upon the subject of mining.

I think I may safely say that this rule in relation to the forfeiture of mining claims is substantially the same as entertained by miners generally themselves. It is not often that a mining law declares that a failure to comply with the one in relation to working and developing mining ground, works a forfeiture. Yet it is generally considered among miners that such a failure will have this effect.

The Spanish edicts upon mining in Mexico, which is the source from which we derived our mining rules and customs, established that all right to mining ground had attached thereto the condition of development. A failure to perform so much work on any mine worked a forfeiture. There a proceeding, in its nature judicial, was always instituted, however, to declare a forfeiture and an adjudication made before the ground was subject to relocation. This, however, in our country, is not necessary. The policy of the government of the United States has been to throw open its mines to its citizens, and to encourage the extraction of as much precious metal therefrom as possible. And observing that miners, by their customs, have attached as a condition to the right to possess and mine any mining ground, that of working the same, they have recognized them. The condition of development should be attached to every mine; and courts should, as far as consistent with legal principles, maintain the construction of mining customs which accomplish this end.

The decisions in California, which generally deserve great weight upon the subject of mining, are far from being satisfactory upon this one subject—forfeiture of mining ground. Undoubtedly mining customs should be construed strictly against forfeiture, as laid down in *Colman v. Clements*, 23 Cal. 248. But where a custom is plain, there is no room for construction, and a court must take it as it reads, and give it its legal effect. The case of *McGarrity v. Byington* 12 Cal. 426, and that of *Bell v. Bed Rock M. Co.*, 36 Cal. 214, certainly lay down a different rule from that expressed here, while *St. John v. Kidd*, 26 Cal. 263, lays down the same rule. It is to be observed that the case of *St. John v. Kidd* does not purport to overrule that of *McGarrity v. Byington*. Nor does the case of *Bell v. The Bed Rock M. Co.* purport to overrule that of *St. John v. Kidd*. The conclusion that we

must come to from this is, that this point has never been fully considered by the California courts. No reasoning is given in support of the rule, in either case, and no authorities; and hence it is impossible to tell how they arrived at their conclusions. The rule we have expressed we believe is in accordance with the established principles of law, and comports with the understanding miners have of their own customs, and is consonant with the policy of the general government.

The point made by appellants' counsel, that, because there was a dispute as to what the customs in German district were, therefore the jury were not warranted in finding a forfeiture, is not well taken. The record shows that there was considerable evidence as to what were the customs of German district. This issue, and the one as to what customs were in force in the district, were properly left to the jury, and this court must presume that they found the one requiring work to be done in the district in order to represent a mining claim, in force.

The objection to the questions asked Kane, "as to whether he knew of any custom within German district which will prevent the representation of ground in said district, by work on a bed-rock flume, commenced in the district below, and as to whether he knew of any custom which had grown up within the limits of this district, whereby parties were prohibited from representing mining ground in one district, by a bed-rock flume started in another, where the bed-rock flume is to drain and work all mining ground belonging to the party above the head of the bed-rock flume," were properly sustained. The written laws of the district, which presumptively were in force, required work in the district to represent ground therein. If any other custom had grown up in that district, allowing parties to represent ground by work outside of the district, it devolved upon the appellants to show it, as this would be considered an amendment to, or modification of, the former custom.

It may be further remarked, in relation to these questions, that from all that appears, they are not proper cross-examination. All that appears from the record, in the examination of the witness in chief, is, that the witness did not know of any custom in German district allowing ground to be repre-

sented by work outside of the district, and that he was familiar with the customs of that district.

There was not sufficient evidence to warrant the court holding that the jury would be justified in finding that German district had been abandoned or merged in a general district for Confederate gulch, called Confederate district. Hence, the objections to the third question asked by appellants of Kane, and the one asked O'Brian, in relation to the customs of Confederate gulch, were properly sustained. When there are customs upon any one subject in a district, the parties must be limited to those. The customs of an outside district could not be introduced to vary them.

The appellants' counsel asked Grubb, one of the defendants' witnesses, the following question: "If a man has a bed-rock flume in a gulch with which he designs to mine several pieces of mining ground in the same gulch, that lie separate from each other in different districts, do you know of any custom in German district that requires a separate flume for each piece of ground to represent the same?"

The first point that may be noticed in relation to this question is, that if answered in the affirmative it would show a custom in German district in relation to what would be representation in another district, and if answered in the affirmative, surely the appellants would not have been benefited, as it was not pretended that they had two bed-rock flumes. If the witness had answered in the negative, I am still unable to perceive what benefit the appellants would have derived. The written laws of the district had been introduced in evidence, and these provided for work in the district to represent mining ground therein, and as before remarked, these laws were presumptively in force, and it devolved upon appellants to show a positive custom allowing them to represent their ground by work outside of the district. The mere fact that there was no direct mining rule prohibiting ground from being represented in this way amounted to nothing. The point they were required to establish was, that there was a positive custom sanctioning this kind of representation. A court should not reverse a case unless it appears clearly that the appellant was either actually or presumptively damaged by the error complained of.

The written customs introduced by respondents were properly received. Sufficient evidence concerning them had been introduced to raise a presumption that they were laws of the district. It is not claimed that they had possession of the other laws of the district and refused to introduce them. It was left to the jury to determine whether they were the laws of the district or not. If they found that they were *prima facie*, they were in force.

The court refused to allow the appellants to introduce evidence to the effect that at the time the laws of German district were established, German district was much larger than at present, and embraced where appellants' bed-rock flume is situated.

It will be observed that appellants do not seek by this question to determine the size of the district at the time the mining ground was located by the grantors of appellants, but the size of the district at the time laws were passed. Undoubtedly those who have created a mining district may change its extent so that they do not interfere with vested rights. If these claims were located by those under whom appellants claim subsequent to the change in the size of the district, appellants could not complain, and from all that appears from the record this may have been the case. In conclusion, I may say that where it appears that mining ground could not be worked profitably without going outside the district to run a bed-rock flume or drain-race to it, a custom which would require work to be done in the district to represent it, might be considered unreasonable. All mining customs must be reasonable. In this case, however, I gather from the whole record that the appellants had mining ground in the district below, called Baker district. That the primary object of this bed-rock flume was to work this ground. I do not think any mining custom is unreasonable which requires work to be performed directly in reference to ground in the district in which it is in force.

For these reasons the judgment of the court below is affirmed.

Exceptions overruled.

LEET ET AL. V. THE JOHN DARE SILVER MINING Co.

(6 Nevada, 218. Supreme Court, 1870.)

Labor on claim or location. The local laws of White Pine district which require two days work for every location do not mean two days work for each two hundred feet but for the entire mining claim irrespective of the number of locators or feet.

¹**The word "location" construed.** The word location, as found in the written laws of White Pine mining district, refers to the aggregate of ground claimed as a mine, and not to the interest of a single tenant in common, nor to any specific number of feet or section of the mine.

Appeal from the District Court of the Eighth Judicial District, White Pine County.

The facts appear in the opinion.

ROBERT M. CLARKE, A. C. ELLIS and TILFORD & FOSTER,
for appellant.

THOMAS P. HAWLEY, for respondents.

By the Court, JOHNSON, J.

The record here shows that there is a controversy between the above-named parties respecting the right of possession to certain described mining ground in the White Pine district in this State. At the trial had in the court below, plaintiff obtained judgment, and a new trial being denied, upon application of defendant this appeal is brought from both the judgment and the order denying a new trial.

Each party claims under the mining rules and regulations of said district, subordinate necessarily to the federal laws applicable thereto; and the facts, so far as we consider them material or necessary in determining the question raised on this appeal as agreed to, may be stated thus: The White Pine mining district was organized on the tenth of October, 1865, at which time the miners of said district adopted certain rules and regulations respecting the location and holding of mining claims therein. On the twentieth of July, 1867, amendments were made to these rules and regulations in

¹ *State v. Real Del Monte Co.* 4 M. R. 335.

certain particulars. It should furthermore be stated that in this appeal no question is raised as to the regularity of proceeding in adopting the amendments referred to.

The original rules and regulations provided that "each claimant shall be entitled to hold by location two hundred feet on any lead in the district." No specified amount of work on a location thus authorized was required, whereas the amendments of July, 1867, seem to have been intended chiefly to supply this omission. The amended laws bearing upon the questions before us, read as follows. Second: When a claim is located and the proper notice put on it, there shall be allowed ten days to file a notice for record, and thirty days additional time, within which the proper amount of work must be done on the ledge. Third: All locations already recorded shall have two days work done on them for every location, on or before the first day of February in each year, which work shall hold good until the twentieth of July of the same year, and all locations made hereafter shall have the same amount of work done on them within forty days after locating them; which work shall hold good for one year from the date of the record of such work. Fourth: Any location having the necessary amount of work done on it, as in the previous article, shall have the same surveyed and the work recorded by the recorder within ten days after said work is done. Fifth: Any claim upon which the necessary work is not done by the first of February shall be subject to relocation. Sixth: Any claims having the necessary work done upon them within three months previous to the adoption of these by-laws, shall be considered as having done work to hold for one year from this date, the same being duly recorded as per article fourth. * * * Ninth: Work done upon any portion of a location shall be deemed as having been done for the benefit of the whole of said location, except as in case as stated hereinafter. * * * Eleventh: In case when a portion of a company refuse to do the necessary amount of work to hold their claim, after being notified, by placing a written notice in the recorder's office for twenty days, and the other portion of the company wish to work enough to hold their part of the said claim, they shall give notice in writing of their intention to the recorder, and designate what

part of the claim they wish to hold, and have the work recorded for that part of the claim, and the balance of said claim shall be subject to relocation if the laws are not complied with."

On the eighth day of June, 1868, the grantors of the "John Dare mining company," defendants, located the "Bulwark mine" of twelve hundred feet (six locations of two hundred feet each), and within forty days thereafter did two days work on the entire claim. On the eighteenth day of February, 1869, Leet *et al.*, plaintiffs, located eight hundred feet of the mining ground embraced in that of defendants, known as "The Happy Jack." There were three locations in this company, claiming for each one, two hundred feet; also an additional two hundred feet as a discovery claim, to be divided equally between them. It also appears that within forty days thereafter, these parties had work done on the ground thus located of at least two days for each two hundred feet of said location.

Passing other points made on the hearing of the appeal, we rest our decision on one question in the case which we regard as decisive: Do these mining laws require two days work for each two hundred feet, or two days work for the entire mining claim, irrespective of the number of locators or feet? The rulings and instructions of the court below, properly brought before us by the exceptions, hold in effect, that the earlier locators—the interest represented by "The John Dare company"—had forfeited their rights and rendered the mining ground in controversy subject to relocation under the mining laws of the district at the date of the latter location, February 18, 1869, for the reason that they had not done two days work for each two hundred feet of the ground they claimed by the "Bulwark mine" location in June, 1868. If the two days work was sufficient to hold the Bulwark mine—twelve hundred feet—the plaintiff had no right to relocate any portion of the ground of defendants, and consequently the judgment should be reversed.

It will be seen that section third of the mining laws uses the words "locate," "locations" in the sense as the aggregate of the ground claimed by the parties, and not as the interest in common of a single shareholder. The proper steps being

taken, the co-locators have no separate interests, but a common interest, which in itself is not susceptible of division or representation, except under proper judicial proceeding or section eleventh of the mining rules.

Why then attach a responsibility, or worse yet, make a forfeiture of a right which is not usually favorably considered by courts? Smith's Com., Sects. 459, 468, 495 to 499; *Colman v. Clements*, 23 Cal. 248.

Section third of these mining laws thus construed harmonizes with other parts of the same laws, as will be seen from the quotations already given, especially section fourth. The entire mining law must be taken and construed together, if need be, and if possible, made to harmonize: 32 Cal. 95; 31 Id. 240.

On a full examination of the record in this case, we conclude that in view of the facts shown by defendants in respect to the amount of work done on the location of June 8, 1868, by their predecessors, that it was sufficient under the mining laws of the district, and consequently the plaintiffs had no right upon that question alone to relocate any portion of the ground claimed by defendants; wherefore the judgment is reversed and the cause remanded.

Reversed.

HARVEY V. RYAN ET AL.

(42 California, 626. Supreme Court, 1872.)

No distinction between written and unwritten customs. No distinction is made by the statute in California between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law.

District rules become void by non-user. Such laws, whether written or not, acquire validity from the customary obedience of the miners, and are void whenever they fall into disuse: Hence, an unwritten regulation, reasonable and in general use, may prevail against a written custom which has fallen into disuse.

Proof of location notice required by unwritten rule. It is error to reject proof of a parol custom requiring a location notice, although such notice was not required by the written rules.

¹ A district rule must not only be established, but must remain in force, and whether it be in force or has fallen into disuse is a question of fact for the jury.

Appeal from the District Court of the Second Judicial District, Butte County.

This was an action to recover possession of certain mining ground in Sawmill Ravine, Cherokee Flat district, Butte county, and five hundred dollars damages for alleged illegal detention. The defendants answered, fully denying the allegations of the complaint, and setting up title in themselves. The cause was tried before a jury, and a verdict was rendered in favor of plaintiff for possession of the ground and one cent damages. Judgment having been entered in accordance with the verdict, and a new trial denied, the defendants appealed from the order.

BELCHER & BELCHER, for appellants.

HAYMOND & STRATTON, for respondent.

By the Court: NILES, J.

This was an action of trespass involving the right to the possession of certain placer mining claims. The defendants claimed under a location purporting to have been made in May, 1858. The plaintiffs claimed a portion of the same ground under a location purporting to have been made in May, 1866.

It was proven at the trial that at a meeting of the miners of the mining district, held in November, 1861, certain written rules were adopted, regulating the manner of location and size of claims. These rules contained no requirement that notices should be posted upon the claims at the time of location. The defendants offered to prove by several witnesses that, at the time plaintiffs claimed to have located the ground, there was a custom in the mining district that required a party locating, to post a notice of his claim upon the ground. The testimony was rejected upon the ground that there were written rules in force in that locality, and that those rules superseded any custom in regard to locating claims.

² *Colman v. Clements*, 23 Cal. 245; *Post EJECTMENT*.

In this class of cases the statute authorizes proof "of the customs, usages or regulations, established and in force at the bar or diggings embracing such claims," and declares that "such customs, usages, and regulations * * * shall govern the decision of the action": Practice Act, Sec. 3, p. 621. No distinction is made by this statute between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse or is generally disregarded. It must not only be *established*, but *in force*. A custom reasonable in itself, and generally observed, will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the law is in force at any given time.

The custom sought to be proven in this case was not even in conflict with the mining laws. It merely prescribed another and not unreasonable act in the series of acts required for location. The exclusion of the evidence was error.

It is unnecessary to pass upon the validity of the instructions refused by the court. The testimony comes up to this court in such confused and unintelligible shape that it is impossible to learn from the record whether the instructions did or did not apply to the proofs presented.

Judgment and order reversed, and cause remanded for a new trial.

Mr. Justice SPRAGUE did not participate in this decision.

ORR, Appellant, v. HASKELL, Respondent.

(2 Montana, 225. Supreme Court, 1874.)

Affidavits required upon extraneous errors. The Supreme Court of Montana will not consider errors assigned for irregularity in the proceedings of the court, and accident and surprise, unless supported by affidavits, as required by § 234 of the Practice Act.

New trial—Verdict against evidence. It must be clear that the jury has erred before a new trial will be granted on the ground that the verdict is against the weight of the evidence or unsupported by it.

Evidence—The district books—Montana practice. The book containing the mining laws of a district is competent evidence under § 504 of the Montana Practice Act, viz.: "In actions respecting mining claims, proof shall be admitted of the customs, usages and regulations * * * and such customs, usages and regulations, when not in conflict with the laws of this Territory, shall govern the decision of the action." And, under § 207 of the same act, the book was rightfully taken by the jury to the jury room.

Objection to sufficiency of answer after verdict. An objection that the answer is insufficient to form an issue, comes too late when made for the first time after verdict.

Appeal from Third District, Lewis and Clarke County.

The judgment was rendered by WADE, J., upon verdict in favor of defendant. The following sections of the Civil Practice Act are referred to in the opinion:

"In actions respecting mining claims, proof shall be admitted of the customs, usages and regulations established and in force in the mining district embracing such claim; and such customs, usages and regulations, when not in conflict with the laws of this Territory, shall govern the decision of the action: Civ. Pr. Act, § 504.

"Upon retiring for deliberation, the jury may take with them all papers (except depositions), accounts or account books, which have been received as evidence in the case: Civ. Pr. Act, § 207.

TOOLE & TOOLE, for appellant.

The denials in the conjunctive in the answer admit that appellant was the owner and seized in fee of the premises in controversy: 2 Estee's Pl. 657, 781, and cases there cited; 3 Id. 48, 665, and cases there cited. The statute provides that every material allegation in the complaint, not specifically denied in the answer, shall be deemed admitted on the trial: Civ. Pr. Act, § 65.

The answer does not deny appellant's right of possession, and right of possession is sufficient to maintain the action. No abandonment or forfeiture is pleaded. These defenses must be pleaded specially against a seizure in fee, when prior pos-

session is not denied. There is no evidence of abandonment.

Was there a forfeiture under the laws of the district? No forfeiture can be had if the laws do not provide for it; forfeitures are odious in law and never occur by implication: *McGarrity v. Byington*, 12 Cal. 426; *English v. Johnson*, 17 Id. 117; *Bell v. Bed Rock T. & M. Co.*, 36 Id. 214.

No adverse possession is claimed during the time limited by the statute, and the statute of limitation is not relied on.

The property once admitted to be in appellant can only be lost by gift or sale, abandonment, forfeiture or adverse possession. Nothing of this nature is proved.

The new matter in the answer does not show adverse possession: 2 Estee's Pl. 23, 26, 912, 929, and cases there cited.

The admission of the mining laws in evidence, for the jury to construe, is error: *Fairbanks v. Woodhouse*, 6 Cal. 433; *Dutch F. W. Co. v. Mooney*, 12 Id. 534.

The record shows the ground in dispute was laid over May 14, 1870, and respondents jumped it on the 20th following. On this account they were trespassers, and their action could not ripen into a right.

G. G. SYMES and CULLEN & COMLY, for respondents.

Appellant's objections to the sufficiency of the answer come too late. He went to trial as if the denials were good and conducted his side as if every allegation of the complaint was denied. Appellant thereby made the denials good and sufficient: *White v. Spencer*, 14 N. Y. 247; *Wall v. Buffalo W. Works*, 18 Id. 119; *Elton v. Markham*, 20 Barb. 343; *Seely v. Engell*, 3 Kern. 542; *Daniels v. Andes I. Co.*, 2 Mont. 78.

The assignment of errors by appellant is wholly insufficient: *Griswold v. Boley*, 1 Mon. 545.

The grounds alleged for a new trial, which require affidavits, must be disregarded. They are not supported by affidavits: Civ. Pr. Act, § 234.

Appellant failed to comply with the rules of the district, and the jury could reasonably find an abandonment therefrom: *King v. Edwards*, 1 Mon. 235; *St. John v. Kidd*, 26 Cal. 264.

Abandonment need not be pleaded, but is admissible under a denial of title: *Bell v. Bed Rock T. & M. Co.*, 36 Cal. 214; *Willson v. Cleaveland*, 30 Id. 192.

The book containing the mining laws was properly admitted in evidence: Civ. Pr. Act, § 504. This book is the best evidence of the existence of the written rules.

SERVIS, J.

This was an action to recover possession of certain placer mining ground described in the complaint as situate in "Helena Hill District, Lewis and Clarke county, Montana Territory." The complaint also alleged that plaintiff was the owner thereof, and seized in fee; that defendants ousted him from the possession and wrongfully and unlawfully withheld the same.

The defendants, by answer, substantially denied all the allegations of the complaint, and averred that *they* were possessed of and the owners of 600 feet of the property in question, describing the same.

Upon this state of the pleadings, and without objection, the parties proceeded to trial to a jury. After the plaintiff had rested, the defendants, amongst other evidence, offered a book containing the rules and regulations of the miners in said Helena Hill mining district, which the court admitted over the objection and exception of plaintiff.

After the defendants had rested, the court instructed the jury precisely as requested by the respective parties, and without objection or exception by either; and the jury rendered their verdict for the defendants. Whereupon the plaintiff moved for judgment *non obstante veredicto*, which the court overruled, without objection or exception.

The plaintiff then moved for a new trial on the following grounds, viz.:

1. Irregularity in the proceedings of the court, by which plaintiff was prevented from having a fair trial.
2. Accident and surprise, which ordinary prudence could not guard against.
3. Insufficiency of the evidence to justify the verdict, and that the same was against the law.
4. Errors of law occurring at the trial and excepted to by plaintiff.

5. Error of the court in admitting and submitting miners' rules, regulations and customs, to the jury.

6. That the verdict is against the law and the evidence.

So far as respects the first two errors assigned, this court can not consider, as the same is not supported by affidavits, as required by the 234th section of the code.

As to the third and sixth errors assigned, which are of one and the same import, viz., insufficiency of evidence to warrant the verdict, and that the same is against the law of the case, we will consider together.

The law of the case was substantially embodied in the instructions given to the jury, which were given in the precise language as requested by the respective counsel; and while *I* do not either admire or practice this mode of giving instructions to a jury, yet, as there was no objection or exception taken to the instructions as given, we fail to see wherein the verdict was contrary to the law of the case.

As to the insufficiency of the evidence to support the verdict upon an examination thereof, as presented by the record, we find the same did, without objection thereto, at least tend to show that the ground in controversy was a part and parcel of the public domain; that it was situate within a regularly organized mineral district; that the tenures and possession of mining claims therein were subject to the then existing rules and regulations of *that* district; that the ground in controversy was vacant in 1869 and 1870; that plaintiff had not complied with the rules of the district, which was thereby an abandonment of any right he might have had thereto; that defendants, finding the same so vacant and abandoned, located the same and thereafter complied with the rules of said district, whereby to entitle them to the sole and exclusive possession of the same; and further, that although the plaintiff could not, in the fall of 1869, procure water wherewith to work and represent the same, yet in the spring of 1870 he could, as defendants and others did, procure such water. With such proof tending to controvert the plaintiff's claim, and establish the defendants', this court can not here say that the verdict was contrary to the evidence, of which the jury alone were the judges of its weight and credibility. It must be *clear* that the jury has erred before a new trial will be

granted, on the ground that the verdict is against the weight of the evidence or unsupported by it. And if this is the rule, as it undoubtedly is, even in the court where the cause is tried and before whom the witnesses appear and testify, *a fortiori*, ought it to be the rule, when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement.

As to the fourth and fifth errors assigned, they, too, are of one and the same import, viz., the error of the court admitting the book of miners' rules and regulations as evidence, and submitting and permitting them to be taken and considered by the jury in their room.

The admission of the miners' book of rules and regulations of the miners in that district, we think, under section 504 of the Civil Practice Act, was competent, and when so admitted it was proper for the jury to take the same with them to their jury room, as provided by section 207 of the Practice Act.

The plaintiff's counsel, however, with much force and the support of numerous authorities, insist that the answer of the defendants is insufficient to form an issue or to support the verdict.

The answer, it is true, is not as specific and void of negative pregnant as good pleading might require; yet, as no advantage was taken of it, either before or upon the trial, we think the objection comes too late after verdict; and the authorities cited by the defendants' counsel, as well as the holdings of this court in the case of *Daniels v. The Andes Ins. Co.*, 2 Mon. 78, fully sustain this view, especially so, as there is at least one material issue joined with the answer, viz., that of adverse possession, which, although perhaps insufficient in and of itself to form an issue, yet, when supported by evidence unobjected to, tending to establish such possession, can not be disturbed after verdict. And this court, in *Marden v. Wheelock*, 1 Mon. 49, has held that all issues of law are waived after trial upon the facts.

We are, therefore, of the opinion that there is no such error appearing upon the record in this case as to warrant a reversal of the judgment, and the same is affirmed, with costs.

Judgment affirmed.

ROBERTS V. WILSON.

(1 Utah, 292. Supreme Court, 1876.)

Proof of mining rules by copy—Affidavit. In order to introduce evidence of the local mining laws of a district, it is necessary that it should be made to appear *aliunde* that the copy offered comes from the proper custodian, and that such person was empowered to give certified copies thereof, so as to become evidence, and that such was a copy of the laws in force in such district. Such copy can not be proved by affidavit.

Constructive possession, how proved. A party claiming mining ground not actually possessed and worked, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works or monuments, or by the local mining laws and rules, and compliance therewith.

Appeal from the First District Court.

The facts appear in the opinion.

MARSHALL & ROYLE, for appellants.

D. COOPER, for respondents.

BOREMAN, J., delivered the opinion of the court.

This is a suit for mining property. The plaintiffs allege that they were "seized in fee of a certain tract of land and mining claim," fourteen hundred feet long by two hundred feet wide, which they call the "Coresa Lode;" and that being so "seized," the defendants ejected them from the premises and withhold the possession from them. Defendants in their answer deny that the plaintiffs were "seized in fee, or otherwise, of the property described in the complaint;" and they allege that they (defendants) hold under a location, called the "Mountain Tiger," made at a date subsequent to the alleged date of the "Coresa" location, and within the boundaries claimed by the plaintiffs, but alleged that plaintiffs were never in possession thereof, and that said "Mountain Tiger" is a separate and distinct lode, or vein, from that of the "Coresa," and that being such, the defendants could hold it, even if within the boundaries claimed by plaintiffs, the plaintiffs being, under the law of 1866, entitled to locate and hold but one lode or

vein within the boundaries specified in the complaint. A jury trial was waived, and the court, having heard the case, gave judgment for the plaintiffs for the property claimed by them. The defendants, thereupon, moved for a new trial, which being refused the defendants appealed to this court, both from the judgment and the order of the district court overruling the motion for a new trial.

The appellants (defendants below) assign as error the admission in evidence of a paper writing, "Exhibit A," offered by the plaintiffs, as the local mining laws of Tintic mining district, where the property in question is alleged to be situated. In order to introduce the written local mining laws of a district, it is necessary that it should appear *aliunde* that the copy comes from the proper repository, and that such party was empowered to give certified copies so as to become evidence, and that such was a copy of the laws prevailing and in force in the district at the required date: *Harvey v. Ryan*, 42 Cal. 626.

These things have not been, and could not be shown by the certificate attached to the alleged laws. Nor is there any authority for showing them by affidavit. This could only be done by express statute, and no such statute exists. In attempting to prove these facts the opposite party is entitled to his right of cross-examination, from which he is cut off, if *ex parte* affidavits are sufficient. The affidavit does not allege that this paper is an examined copy, or that it is a copy of the originals, or that the originals are in his office.

Nor does it appear either in the certificate or affidavit that the exhibit is a copy of all the laws of the district: *English v. Johnson*, 17 Cal. 115.

None of the requisites having been complied with to make the Exhibit evidence, we are necessarily brought to the conclusion that it was error for the court to admit it in evidence.

The question then arises, was it such error as requires a reversal of judgment below?

Injury is presumed from evidence erroneously admitted, unless it manifestly appears that there is no injury: *Grimes v. Fall*, 15 Cal. 63.

It is claimed by plaintiffs that the introduction of the local laws was not necessary to their case, as the defendants have,

as they allege, admitted plaintiffs' title, claiming only that the "Mountain Tiger" is a separate and distinct lode or vein.

The defendants certainly hold that the "Mountain Tiger" is a separate and distinct vein or lode, but do they admit that plaintiffs had any title to the "Coresa" lode? The answer says: "Defendants deny that on the — day of March, A. D. 1870, or at any other day or date, said plaintiffs were seized in fee, or otherwise, of the said property described in said complaint, or that they were ever on said — day of March, 1870, or at any other date, seized in fee, or otherwise, or possessed of, or entitled to the possession of, that portion of said premises hereinafter designated and set out as being in the possession of these defendants at the commencement of this suit." These denials apply first to the whole of the ground claimed, and the more especially to the part occupied by the defendants. Here we find an express denial of the plaintiffs' title, and there is nowhere to be found in the answer any admission thereof. The only supposed admission arises by inference to the fact that defendants allege that the "Mountain Tiger" is a separate and distinct lode from the "Coresa" lode. There are, therefore, two questions at issue in this case:

First. As to the title of plaintiffs to the "Coresa" lode; and,

Second. As to whether these lodes are one and the same or separate.

In proving plaintiffs' title was it necessary to introduce the mining laws of the district?

The United States Mining Law of 1866 says, that the public domain shall be open to "exploration and occupation by all citizens," etc., subject however "to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The Supreme Court of California, in *Attwood v. Fricot*, 17 Cal. 43, says: "Mining claims are held by possession, but this possession is regulated and defined by usage and local conventional rules, and the 'actual possession,' which is applied to agricultural lands, and which is understood to be a *possessio pedis*, can scarcely be required in a mining claim in order to give right of action for the invasion of it. The claim

must be in some way defined as to limits, of course, before the possession of, or working upon part, gives possession to any more than that part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim."

The converse of this proposition would require that in proving a claim, if its limits be not defined, and the entry be not in pursuance of the local rules and customs, the possession would give title only to the ground actually worked. And such is the doctrine of *English v. Johnson*, 17 Cal. 115, according to which, if no mining rules are sworn to exist under which the location was made and claimed, the party so claiming could, as against another party not claiming under the mining rules, hold his prior claim if its boundaries be "distinctly defined by physical marks," even without proving the local customs or rules.

The same court, in afterward commenting upon the case of *English v. Johnson*, just referred to, says: "While it has been the object and endeavor of the courts of this State to protect miners in the enjoyment of their mining locations on the public lands, justice and policy at the same time require some practical mode of notifying others of the extent of their claims. What that mode shall be, and what the extent of the mining claim may be, is generally regulated by the miners of the particular locality, whose rules in this respect are adopted as rules of law." And the court there says further, that in the absence of these local rules, "the boundaries of the land claimed for mining purposes must be indicated by such distinct physical marks or monuments as will fairly advertise to all concerned where, and what it is, or, in other words, *its extent*."

In that case there being no such physical marks as required, nor any mining rules or customs shown whereby the locator could extend his possession beyond what he actually worked, that is, beyond the *possessio pedis*, his rights did not extend beyond that, and he had nothing whereon to base any claim to constructive possession: *Hess v. Winder*, 30 Cal. 355-8.

A party therefore claiming ground not actually possessed and worked, ground beyond the *possessio pedis*, must show

his right thereto by constructive possession ; and he can show such constructive possession only by physical marks or monuments, or by local laws or rules and his compliance therewith.

In the case at bar, no physical marks or monuments having been shown, it was proposed to show the local mining rules as embraced in "Exhibit A." Without these the plaintiff could show no rights beyond the ground actually worked.

The introduction of the local laws was therefore necessary to the plaintiffs' case ; and if the plaintiffs believed otherwise, they should have refrained from introducing them ; but having introduced them, it would be highly improper for this court to say there was no injury done thereby, where such does not appear to have been the fact. On the contrary, we think that it clearly appears that there was injury, as without the introduction of these laws the plaintiffs could not have obtained this judgment.

The respondents have erroneously concluded that the only question in this case is as to the identity of these two alleged lodes. Were this really the only point, we might say that the judgment of the court below should not be disturbed. But from what has already been said, it seems that the court views the case differently.

Let the judgment of the court below be reversed, and the order overruling defendants' motion for a new trial be revoked, and a new trial granted in the court below.

WHITE, C. J., and EMERSON, J., concurred.

Reversed.

1. Parol evidence not received when there are written rules in force on the same subject: *Raistelton v. Plowman*, 1 Idaho, 596; *Post DUMP*.

2. District record may show compliance with a rule requiring a record of transfer, but is not evidence of the transfer itself: *Attwood v. Fricot*, 2 M. R. 305. It can not prove who was the first locator: *Campbell v. Rankin*, 99 U. S. 261; *Post POSSESSION*.

3. Possession of claim is regulated by district rules: *Attwood v. Fricot*, 2 M. R. 305; *Hicks v. Bell*, 3 Cal. 219; *Post PUBLIC DOMAIN*.

4. Compliance with the district rules (as to staking claim) is essential to a valid location: *Myers v. Spooner*, 55 Cal. 257; *Post LOCATION*; same as to record and notice: *Gleeson v. Martin Co.*, 13 Nev. 443; *Post LOCATION*.

5. The local customs referred to in the Mining Act of 1866, are the district rules: *Robertson v. Smith*, 1 Mont. 410; *Post HIGHWAY*.

6. Mode of pleading forfeiture under district rules: *Dutch Flat Co. v. Mooney*, 12 Cal. 534; *Post* FORFEITURE.

7. Custom to transfer claims without deed: *Blodgett v. Potosi Co.*, 3 M. R. 275.

8. When parties in ejectment are compelled to prove district rules: *Sears v. Taylor*, 4 Colo. 38; *Post* EJECTMENT; *Colman v. Clements*, 23 Cal. 245; *Post* EJECTMENT.

9. District rules may limit size of claim: *McCormick v. Varnes*, 2 Utah, 355; *Post* LOCATION.

10. Proof of written district rules having become obsolete: *Colman v. Clements*, 23 Cal. 245; *Post* EJECTMENT.

11. Irregularities in passage of district rules: *Gore v. McBrayer*, 1 M. R. 645.

12. District rules and district organizations are recognized by Congress, but are not essential: *Golden Fleece Co. v. Cable Co.*, 1 M. R. 120.

13. Judicial notice will not be taken of district rules: *Sullivan v. Hense*, 2 Colo. 424; *Post* LOCATION.

14. The origin and growth of the district organizations reviewed by the Supreme Court: *Jennison v. Kirk*, 4 M. R. 504.

JENNISON V. KIRK.

(98 United States, 453. Supreme Court, 1878.)

¹ **Act of Congress of July 26, 1866, construed—Local customs applied to water rights and rights of way.** The ninth section of the act of Congress of July 26, 1866, “granting the right of way to ditch and canal owners over the public lands, and for other purposes” enacted, “that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid, is hereby acknowledged and confirmed. *Provided, however,* that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage”: *Held*, that both the right to the use of water and the right of way mentioned in said section are subject in their enjoyment to the local customs, laws and decisions; the object of the section being to give the sanction of the United States to rights which had previously existed under such local laws. The proviso conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain, whose possessions might be injured by such construction.

Mining rules, their history and character. The history and nature of miner's laws and customs stated and explained.

Conflicting mining and water claims—Prior appropriation controls. By the customary law of miners in California, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.

² **Injury to ditch occasioned by hydraulic process of mining.** A person who constructs a water ditch across a mining claim previously located and worked by the hydraulic process, holds subject to the prior rights of the owner of the mining claim and can not recover damages for the washing away of a portion of his ditch so that the waters escape, if such washing away is done in the usual and reasonable method of working the mining claim.

¹ Affirms *Titcomb v. Kirk*, 5 M. R. 10.

² *Broder v. Natoma Co.*, 4 M. R. 670.

³ *Proctor v. Jennings*, 4 M. R. 265.

Necessity of water. The loss of its water may be equivalent to the destruction of all value to the claim.

Error to the Supreme Court of California.

The facts are stated in the opinion of the court.

B. F. MYRES, for the plaintiff in error.

No one appearing for the defendant in error.

Justice FIELD delivered the opinion of the court.

In 1873, the plaintiff's testator constructed a ditch or canal in Placer county, California, to convey the waters of a cañon, and of tributary and intermediate streams, to a mining locality known as Georgia Hill, distant about seventeen miles, for mining, milling and agricultural purposes, and for sale.

The ditch was completed in December of that year, and immediately thereafter the waters of the cañon were turned into it. The ditch had a capacity to carry a thousand inches of water, and it is alleged that during the rainy season of the year in California, which extends from about the 1st of November to the 1st of April, the cañon, tributaries and intermediate streams would supply that quantity, and during the dry season not less than one hundred inches. The intention of the testator, as declared on taking the initiatory steps for their appropriation, was to divert two thousand inches of the waters by means of a flume and ditch.

In its course to Georgia Hill, the ditch crossed a gulch or cañon in the mountains, known as Fulweiler's Gulch, the waters of which had been appropriated some years before by the defendant, who had constructed ditches to receive and convey them to a reservoir, to be used as needed. One of these ditches in the gulch was intersected by the ditch of the testator, and the waters which otherwise would have flowed in it were diverted to his ditch. The defendant thereupon repaired and re-opened his own ditch, turning into it the waters which had previously flowed in it, and in so doing cut and washed away a portion of the ditch of the testator, so as to let out the waters brought down from the cañon above, and the intermediate streams. It is for alleged damages thus

caused to the testator, and to restrain the continuance of the alleged injury to his ditch, and any interference with its use, that the present action was brought.

The defendant not only justified the cutting of the testator's ditch in the manner stated, because necessary for the repair and re-opening of his own ditch, and to retain the waters of the gulch previously appropriated and used by him, but on the further ground that the ditch of the testator traversed mining claims owned many years before by him, or those through whom he derived his interest, and would prevent their being successfully worked.

It appears from the answer, which the court finds to be correct in this particular, that for many years prior to this action, the defendant, or his grantors and predecessors in interest, had been in the possession of a portion of Fulweiler's Gulch, extending from a point about twelve hundred feet below the crossing of the testator's ditch to a point about twelve hundred feet above it, including the bed of the gulch and fifty feet of its banks on each side; that during this period the ground was continuously held and worked for mining purposes, and as a mining claim, in accordance with the usages, customs and laws of miners in force in the district; that in working the claim and extracting the gold the method employed was what is termed "the hydraulic process," by which a large volume of water is thrown with great force through a pipe or hose upon the sides of the hills, and the gold-bearing earth and gravel are washed down, and the gold so loosened that it can be readily separated; and that the ditch of the testator traversed the immediate front and margin of this gold-bearing earth and gravel, rendering the same inaccessible from the outlets of the gulch, down which they would be washed, thus practically destroying, if allowed to remain, the working of the mining ground.

On the argument, it was admitted that the defendant's right of way for his ditch was superior to the testator's right of way for the one owned by him, being earlier in construction, and the waters of the gulch being first appropriated; and, therefore, that the duty rested upon the testator, and since his death upon his executor, to so adjust the crossings of the ditches as not to interfere with the full use and enjoyment,

by the defendant, of his prior right. It was contended that such crossings had been so adjusted by the testator, but were destroyed by the defendant.

It was also admitted that the extension of the testator's ditch, at the place where it was constructed across the claim of the defendant, prevented the successful working of the claim; but as the land over which the ditch passed, and on which the claim is situated, is a portion of the public domain of the United States, it was contended that the right of way for the ditch was superior to the right to work the claim; and that such superior right was conferred by the ninth section of the act of Congress of July 26, 1866. That section enacted:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed; *Provided, however,* that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage": 14 Stat. 253.

There are some verbal changes in the section as re-enacted in the revised statutes, but none affecting its substance and meaning: Rev. Stat., Sec. 2339.

The position of the plaintiff's counsel is, that of the two rights mentioned in this section only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water-right, and is not subject in its enjoyment to the local customs, laws, and decisions. This position, we think, can not be sustained. The object of the section was to give the sanction of the United States, the

proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and cañons, and probing the earth in all directions for the precious metals; wherever they went they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State.

The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the

claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain for ever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through cañons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist from their obvious justness, for the security of these ditches and flumes and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands; the policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by

law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz, bearing gold, silver, cinnabar or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired or which might be afterward acquired; the intention expressed was to secure them by a patent from the government. The senator of Nevada, Hon. Wm. M. Stewart, the author of the act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the constitution or laws of the State or of the United States, should govern their determination; and a series of wise judicial decisions had molded these regulations and customs into "a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, under the implied sanction of a just and generous government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached: Cong. Globe, 1st Sess. 39th Cong., Part IV., pp. 3,225-3,228.

These statements of the author of the act in advocating its

adoption can not, of course, control its construction where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.

While acknowledging the general wisdom of the regulations of miners as sanctioned by the State and molded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," can not be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws and decisions of the courts, the owners and possessors should be protected in them, and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, should be "acknowledged and confirmed;" but where

ditches subsequently constructed injured by their construction the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws and decisions of the courts.

This view of the object and meaning of the ninth section was substantially taken by the Supreme Court of California in the present case; it was adopted at an early day by the land department of the government, and the subsequent legislation of Congress respecting the mineral lands is in harmony with it: Letter of Commissioner Wilson of Nov. 23, 1869; Copp's U. S. Mining Decisions, 24; Acts of Congress of July 9, 1870, and May 10, 1872; Rev. Stat., tit. 32. c. 6.

By the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. In the present case, the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that, so far as the flow of the water was concerned, this was done. Had there been nothing further in the case, the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining claim by the hydraulic process. The position of the testator's ditch prevented this working, and thus deprived him of this value of the water, and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch by the defendant, this having been done "in the exercise, use and enjoyment of his own water rights, in the usual and in a reasonable manner," as

found by the court, and in order that his claim might be worked as before, was not therefore, an injury for which damages could be recovered.

Judgment affirmed.

HILL V. NEWMAN ET AL.

(5 California, 445. Supreme Court, 1855.)

¹ **Water rights a corporeal privilege.** The right to water is treated in California as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and as such has none of the characteristics of mere personalty.

² **Relations to the fee.** The right to water may exist without ownership of the soil over which it flows.

Jurisdiction of justice of peace. Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted.

Appeal from the County Court of Placer County.

The opinion of the court contains the facts.

HALE & MYERS, for appellants.

MILLS & HILLYER, for respondent.

No briefs on file.

BRYAN, J., delivered the opinion of the court. HEYDENFELDT, J., concurred.

This was an action brought before a justice of the peace for damages arising from injuries alleged to have been inflicted by the defendants upon the plaintiff by the partial destruction of mining ditches belonging to the plaintiff, and the wrongful diversion of water into ditches belonging to the defendants. The only question which seems to be raised by the record is, whether a justice of the peace has jurisdiction of such a cause, where the injury is to other than personal property.

¹ *Reed v. Spicer*, 4 M. R. 330.

² *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443.

The jurisdiction of justices of the peace in this State embraces actions for damages for taking, detaining and injuring personal property; and actions for the recovery of personal property where the value of the property does not exceed the limit to which the court is confined in the exercise of its jurisdiction. Where there is a right to the use of water for mining purposes, and the appropriation of it, a diversion of the stream could not be called an injury to personal property in the meaning of the law. It seems to me clear that whilst the legislature has conferred upon justices of the peace jurisdiction of an action to determine the right to mining claims, yet that it never was its intention to confer upon those courts power to hear and determine causes in which there may be conflicts as to the right to the use of water.

The right to running water is defined to be a corporeal right, or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes: *Sackett v. Wheaton*, 17 Pick. 105; 1 Cruise's Digest, 39; Angell & Ames on Water Courses, p. 3.

From the policy of our laws, it has been held in this State to exist without private ownership of the soil, upon the ground of prior location upon the land, or prior appropriation and use of the water. The right to water must be treated in this State, as it has always been treated, as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personalty. It therefore follows that a justice of the peace has no power conferred upon him to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted.

The judgment of the court below is therefore reversed, with costs, and the cause is dismissed.

Reversed.

PRIEST V. UNION CANAL CO.

(6 California, 170. Supreme Court, 1856.)

Improper testimony—Error without prejudice. The admission of improper testimony is no ground for disturbing a verdict where it is evident that no injury has been done.

Discretion of court in supplying omission. A court may, in the exercise of a sound discretion, permit a party, at any time before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence.

Sufficiency of complaint to admit of proof of diversion. A complaint alleged that "plaintiffs are entitled, by virtue of prior appropriation to all the water flowing in the cañon at the head of their ditch and that defendants diverted the water to their damage": *Held*, that it was not necessary to state whether the water was supplied at that point by one or more streams, in order to admit proof of a diversion of water from above the ditch.

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

This was an action brought by one ditch company against another, to determine the right to the use of water and for damages, and to obtain a perpetual injunction.

The complaint alleges that the plaintiffs have been, since December, 1853, the owners of a ditch known as "Priest & Co.'s Ditch," leading from a point on the north bank of a stream known as North Shirt Tail Cañon; that said ditch not being of sufficient capacity, they took occasion to enlarge it in December, 1853, and completed the enlargement in September, 1854, to a capacity of 1,584 inches of water; that their ditch was the first constructed leading from said stream, and that they are entitled, as first appropriators, to its waters to the extent of the capacity of their ditch; that the defendants, subsequently to the enlargement of plaintiffs' ditch, constructed a ditch leading from a point about two miles above the head of plaintiffs' ditch, thereby diverting the waters naturally flowing through said stream, and diminishing the amount of water to which plaintiffs were entitled.

The answer avers that defendants' ditch was located, surveyed and commenced in April, 1854, and before the enlarge-

ment of plaintiffs' ditch, which, before its enlargement, they aver, had a capacity of only 200 inches of water; and they deny that plaintiffs are entitled to any more, and deny that defendants' ditch has diverted the water so as to cause a diminution of that quantity.

After the defendants had rested their case, the court allowed the plaintiffs to call a witness to prove that after the defendants had completed their ditch and the plaintiffs had completed their enlargement, the defendants constructed a ditch to the head of their first ditch from a point on the south branch of said stream above plaintiffs' ditch, and above the junction, by means of which they emptied the waters of the south branch into the north branch above defendants' original dam, and from that point carried the waters through their old ditch to the diggings below. The defendants objected to the introduction of this testimony, on the ground that it was not offered by way of rebuttal, and that it was not admissible under the pleadings.

The jury found a verdict that the plaintiffs were entitled to 250 inches of water, from the north branch of the north fork of the cañon, and to all the water of the south branch.

Judgment accordingly. Defendants appealed.

DIBBLE & MYERS, for appellants.

HALE & HILLYER, for respondent.

The opinion of the court was delivered by Mr. Justice TERRY. Mr. Chief Justice MURRAY concurred.

This was an action to determine the right to the use of water, plaintiffs claiming by virtue of prior appropriation. The case was tried below by a jury, and judgment rendered in favor of plaintiffs.

Exceptions were taken on the trial to the admission of testimony to show that plaintiffs had, before the construction of defendants' canal, bargained for lumber, and posted notices of their intention to enlarge their ditch, so as to appropriate all the water flowing in the stream at its head. Whether this testimony was admissible or not, it is not necessary for the purposes of this case to inquire, for the reason that the verdict

of the jury clearly shows that defendants were not prejudiced by it; and where it is evident that no injury has been done, the admission of improper testimony is no ground for disturbing a verdict.

. It is also contended that the court erred in allowing plaintiffs, after defendants had closed their evidence, to introduce a witness for the purpose of showing that defendants had, subsequent to the completion of plaintiffs' ditch, extended their canal so as to carry off the water of the south branch of the cañon, which had been before appropriated by plaintiffs; first, because it was new evidence, not rebutting, and upon a point not before testified to; and, second, because there was no allegation in the complaint as to said connecting canal.

It is well established that a court may, in the exercise of a sound discretion, permit a party at any time before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence, and unless it appears that injustice has been done by the abuse of this discretion, the admission of such testimony is no ground for reversal.

As to the second objection, the complaint alleges that plaintiffs are entitled, by virtue of prior appropriation, to all the water flowing in the cañon at the head of the ditch, and that defendants diverted the water to their damage.

This allegation was sufficient for the information of defendants, and it was not necessary to state whether the water was supplied at that point by one or more smaller streams.

From a careful investigation, we conclude that there is no error sufficient to disturb the judgment; it is therefore affirmed with costs.

Affirmed.

BURDGE V. UNDERWOOD.

(6 California, 45. Supreme Court, 1856.)

¹ **Mining and agricultural rights under local statute.** In permitting miners to go upon lands occupied by others for agricultural and grazing purposes, the legislature legalized what would have otherwise been a

¹ *Rupley v. Welch*, 4 M. R. 243; *Ah Yew v. Choate*, 1 M. R. 492.

trespass, and the act can not be extended by implication to a class of cases not specially provided for; *e. g.*, it can not be extended in favor of a ditch for mining purposes.

Ditch across ranch claim. A miner has no right to work within the inclosure surrounding a dwelling house, corral and other improvements of another.

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

The plaintiff brought his action to abate a nuisance in digging a ditch through plaintiff's inclosure, and for damages.

The defense set up is that the ditch was made to conduct water for mining purposes, and that the land is public land, only occupied by plaintiff for agricultural and grazing purposes.

By the finding of the court, it appears that in 1852 the plaintiff took up a tract of public land which he has ever since used for agricultural and grazing purposes. "That within the time allowed by law, and before the commission of the acts complained of, the plaintiff had constructed a corral, dwelling and outhouses, and fences, greatly exceeding in value the sum of \$200. That while plaintiff was there residing upon, cultivating and grazing said land, the defendants, for the purpose of conveying water to certain mining claims owned by them, and distant about one mile from plaintiff's premises, constructed the ditch mentioned in plaintiff's complaint, through a part of plaintiff's inclosures, and within twenty-five or thirty feet of plaintiff's corral, at the time and afterward used by him for corralling his cattle, and to the depth, near said corral, of about six feet. That said ditch was dug against the wishes and consent of plaintiff for the purpose aforesaid, and upon the most practicable route to convey the water to said claims from a ravine above the premises of the plaintiff. That it could have been constructed so as not to run through or interfere with the plaintiff's premises, but at a greatly increased cost." * * * "That a portion of said premises, some distance from said corral, had been prospected and found to contain gold. That said ditch prevents plaintiff from using his corral without endangering his animals." The court also finds the actual damage sustained by plaintiff and the cost of

filling up the ditch, making in all \$114, for which sum and for the abatement of the nuisance the court gave judgment. Defendants appealed.

R. S. MESICK, B. A. MYERS and CROCKER & ROBINSON, for appellants.

Cited *Stoakes v. Barnett*, 5 Cal. 36; *McClintock v. Bryden*, Id. 97; *Irwin v. Phillips*, Id. 140; *Hicks v. Bell*, 3 Cal. 219.

MILLS & HILLYER, for respondent.

The opinion of the court was delivered by Mr. Justice HEYDENFELDT. Mr. Justice TERRY concurred.

In *Stoakes v. Barrett*, 5 Cal. 36, *McClintock v. Bryden*, Id. 97, and *Irwin v. Phillips*, Id., we decided that the prior possessory rights of settlers on the public lands for agricultural and grazing purposes, must yield to the rights of miners to extract from the land the precious metals. This was a necessary deduction from the statute, which expressly makes the distinction. But this statute can not be extended by construction. If so, it would require us to overturn other well defined and settled principles. In *Tartar v. Spring Creek Co.*, 5 Cal. 395, we said: "The current of decisions of this court goes to establish that the policy of this State, as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." That "this policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, except in the single case where the right of the agriculturist is made to yield to that of the miner when gold is discovered in his land."

In *Fitzgerald v. Urton*, 5 Cal. 308, it is said: "In permitting miners, however, to go upon lands occupied by others, it (the legislature) has legalized what would have otherwise been a trespass, and the act can not be extended by implication to a class of cases not specially provided for."

It results from a review of these decisions that there was no error in the opinion of the district court, and the judgment is affirmed.

Affirmed.

HOFFMAN ET AL. V. STONE ET AL.

(7 California, 46. Supreme Court, 1857.)

¹ **Ravine used as ditch bed.** A ditch owner may use a ravine as a connecting link between different portions of his ditch, and the fact that the water which at times flowed naturally into the ravine had been previously appropriated by others would not deprive him of this right; the appropriation of the water does not carry with it the exclusive use of the bed of the stream.

Prior appropriation. If the ditch owner divert the natural water of the stream as well as that brought into it by him, then the prior appropriator would have a cause of complaint.

Appeal from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action brought by the owners of a ditch (which received its supply of water from Dutch creek, or ravine, near its mouth), in El Dorado county, for the purpose of procuring a perpetual injunction against the defendants, restraining them from diverting or appropriating the waters of the said ravine, and also for the recovery of a small judgment against them, by way of damages. The defense was that Dutch ravine was usually a dry creek, affording no natural water during the summer months, and that the defendants, in order to connect two of their canals, had precipitated the water from the upper one into the creek, and taken the same out again, by means of a dam, into their lower ditch, and that they had not interfered with the natural water of said ravine. The case was tried by a jury, who found a special verdict, on which the court granted a perpetual injunction against the defendants, restraining them from diverting water from the main channel of Dutch creek, so as to prevent the same from flowing down said creek to the extent of the capacity of plaintiffs' ditch. Defendants appealed.

SANDERSON & HEWES, for appellants.

NEWELL & WILLIAMS, for respondents.

¹ *Richardson v. Kier*, 4 M. R. 612.

MURRAY, C. J., delivered the opinion of the court, BURNETT, J., concurring.

The former decisions of this court, in cases involving the right of parties to appropriate waters for mining and other purposes, have been based upon the wants of the community and the peculiar condition of things in this State, for which there is no precedent, rather than any absolute rule of law governing such cases.

The absence of legislation on this subject, has devolved on the courts the necessity of framing rules for the protection of this great interest, and in determining these questions, we have conformed, as nearly as possible, to the analogies of the common law.

The fact early manifested itself, that the mines could not be successfully worked without a proprietorship in waters, and it was recognized and maintained. To protect those who, by their energy, industry and capital, had constructed canals and races, carrying water for miles into parts of the country which must have otherwise remained unfruitful and undeveloped, it was held that the first appropriator acquired a special property in the waters thus appropriated, and as a necessary consequence of such property, might invoke all legal remedies for its enjoyment or defense. A party appropriating water, has the sole and exclusive right to use the same for the purposes for which it was appropriated, and so long as he is not obstructed in the use thereof, he has no ground of action.

In the case before us, it is shown that Dutch gulch was a mere torrent, dry at certain seasons of the year; that it was used by the defendants as a part of their ditch, for conducting water from another stream down to their dam; that in point of fact, the water so brought to Dutch gulch, and turned in there by defendants, was not abandoned by them, but was turned in for the purpose of being conveyed to their dam, from whence it was afterward diverted and sold by them; that there was, at the time of the commencement of this suit, no natural water flowing in the bed of the stream, and that all the waters so diverted by the defendants, were artificial, or waters conducted there by them.

The plaintiffs being the prior locators, it would follow that

any interference with the waters of Dutch gulch would be an infraction of their rights. But the appropriation of the waters did not give them the exclusive use of the bed of the stream. We see no reason why it might not be used by others, as a channel for conducting water, so long as it did not interfere with their rights. If the defendants were diverting the natural water of the stream, as well as that brought into it by themselves, then the plaintiff would have a just cause of complaint.

It would be a harsh rule, however, to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch or cañon. It is contended, however, that this case falls within the rule of *Eddy et al. v. Simpson et al.*, 3 Cal. 249, and *Kelly v. Natoma Water Co.*, 6 Cal. 105. We do not think so. The verdict of the jury finds that the water was not abandoned by the defendants and left to find its way by natural channels into Dutch gulch, but was turned in by the defendants making the gulch a connecting link of their ditch.

Under all the circumstances of the case, we do not see how the plaintiff is entitled to relief. It may very possibly happen, that at certain seasons of the year, the defendants' dam will obstruct the water running in the natural channel of the stream which, of right, belongs to the plaintiffs, and in that event, they would have their action. But at the date of the commencement of this suit, no such state of facts is shown to exist, and the plaintiffs are not entitled to any relief.

Judgment reversed.

PARKE ET AL. V. KILHAM.

(8 California, 77. Supreme Court, 1857.)

¹ **Locating claims—Reasonable diligence.** In the locating of ditches, a base line is generally first run to ascertain whether the water in the stream can be made to flow to the point where it is intended to be used. The

¹ *Sieber v. Frink*, 7 Colo. —.

line upon which the ditch is actually intended to be dug should afterward be run within a reasonable time, which must depend upon the circumstances of each particular case.

¹ **Water rights—Estoppel.** If those who have the prior right to water stand by and allow others to expend money and labor in appropriating the waters of a stream under the mistaken idea that they have the better right to the water, the first appropriators will be estopped from setting up their prior right.

Nuisance—Ditch wrongfully diverting water. An injury occasioned by the diversion of water is in the nature of a nuisance. To turn aside a useful element from the premises is as much a nuisance as to turn upon them a destructive element.

Joinder of co-tenants. In an action for diverting water by ditch, tenants in common should be joined. It would be error for them to sue separately.

Appeal from the District Court of the Fifth Judicial District, County of Amador.

On rehearing. Parke and Struck, the plaintiffs in the court below, brought this action to recover from defendant the use of the waters of the middle fork of Jackson creek, and for damages, alleging a priority of right thereto. The answer of defendant denied plaintiffs' priority, and claimed an exclusive right to the use of the waters of that stream. The testimony showed that plaintiffs' grantors about the first of December, 1852, located a mining claim on the creek, at a place called Elliott's Ranch, and in order to work it erected a small dam in the creek and turned a portion of the water into their claim, for mining purposes.

That in October, 1852, the grantors of defendants projected a line of ditch, by drawing a base line from the lower end thereof to a point on the creek some distance below Elliott's Ranch, where they designed erecting their dam, and at the same time put up notices on the creek of their intention to use and appropriate the waters thereof in their contemplated work.

That in the spring of 1853, when the ditch was nearly complete, they changed the upper part thereof so as to take the water out of the creek about one hundred rods above the mining ground occupied by plaintiffs' grantors.

That in doing this, they ran the ditch through the Elliott Ranch, and paid Elliott, who was one of plaintiffs' grantors, a

¹ *Golden Terra Co. v. Mahler*, 4 M. R. 390.

small sum for the right of way, and agreed to give him some water for irrigating purposes. There was some testimony going to show that plaintiffs' grantors had witnessed the appropriation of the water by defendant's grantors, and had acquiesced therein.

On the trial, defendant's counsel asked the court to instruct the jury "that if those from and through whom the plaintiffs claim had the prior right to the waters in the middle fork of Jackson creek, 'and they stood by and saw' those from whom defendant derives his title to the ditch and the right to the waters of the said creek, appropriate the water of the creek, at a great expenditure of money and labor, under the mistaken idea that the defendant's vendors were obtaining the first appropriation, and did not inform them of the mistake, that they, plaintiffs' vendors, and the plaintiffs, who claim under them, are estopped from setting up their prior right at this time." This instruction the court refused to give, and defendant excepted.

Plaintiff had a verdict for a small money judgment and for one hundred inches of water. The defendant moved for a new trial, which being denied, he appealed.

ROBINSON, BEATTY & BOTTS, for appellant.

SMITH & HARDY, for respondents.

BURNETT, J., delivered the opinion of the court, MURRAY, C. J., concurring.

This case was decided at the last April term of this court, and a re-argument had at the present time. We are satisfied, upon a more full argument and a more careful consideration of the case, that the judgment of the court below should be reversed, and a new trial had. The learned counsel for the defendant insists that we did not correctly understand him, when we said, in a former opinion, that "this position is based upon the idea that the proper point could not be designated with certainty by a proper survey, but must be determined by the actual construction of the ditch."

Taking the language of the brief in connection with the facts as proved, we did so understand the counsel. It was

proved by Cunningham, one of defendant's witnesses, that "the base line was run for the purpose of determining where the ditch would strike the creek. This point was ascertained by starting at the upper end of the base line, and leveling up the creek far enough to allow the ditch a sufficient declivity, which we did in October, 1852, and we placed our notice of claim of water at this point on the creek above the end of the base line." "It was not until the spring of 1853, that we thought of adopting the upper line, on which we dug the ditch."

This statement of the witness is very explicit, and shows that the point where the notice was placed was intended as the upper terminus of the ditch. This being true, the argument of the learned counsel would hardly be applicable to the facts proved, unless taken as we understand it. We, however, cheerfully make the correction.

It is, undoubtedly, true, that a base line is generally first run from the point where the water is to be used, to the stream from which it is proposed to be taken. This line is run upon a level, and the object is to ascertain the fact, whether the water in the stream can be made to flow to the point where it is intended to be used. The line upon which the ditch is actually intended to be dug, should afterward be run within a reasonable time, which must depend upon the circumstances of each particular case.

The instruction offered by the defendants, we now think, was substantially correct, and should have been given.

There was a point made by the defendant which we did not notice in our former opinion. It is insisted that there is a misjoinder of parties plaintiffs, as they were tenants in common, and should have brought separate suits for the restitution of the water. In the case of *DeJohnson v. Sepulbeda*, 5 Cal. 149, it was held that "for injuries to their common property, as trespass *quare clausum fregit*, or nuisance, etc., tenants in common should all be joined, but they must sue severally in real actions, generally, as they have separate titles." See also *Throckmorton v. Burr*, 5 Cal. 400.

The injury complained of in this case is in the nature of a nuisance. It is very similar to the obstruction of ancient lights. To turn aside a useful element from the premises, is

as much a nuisance as to turn upon them a destructive element. In both cases, the injury may be equally material. A ditch, to carry off water rightfully flowing to a mining claim, is as much a nuisance as a dam to flood the premises.

For these reasons the plaintiffs properly brought their suit jointly. It would have been error for them to have sued separately. The judgment of the court below is therefore reversed, a new trial ordered, and the cause remanded for further proceedings.

Reversed.

THE BEAR RIVER AND AUBURN WATER AND MINING
Co. v. THE NEW YORK MINING Co.

(8 California, 327. Supreme Court, 1857.)

¹ **Diminution of water supply.** The first appropriator of water by means of a ditch is entitled to have the water flow without material interruption in its natural channel, so undiminished in quantity as to leave sufficient to fill his ditch as it existed at the time the later locations were made above.

¹ **Deterioration in quality of water.** The deterioration in the quality of the water in the ditch, by means of its use for mining purposes above, should be considered as an injury without consequent damage.

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

The parties to this action are incorporated companies for mining and other purposes. Each company is the owner of a dam and ditch, by means of which the waters of Bear river are diverted from the natural channel of the stream, and sold and used for mining purposes, and by defendants for the additional purpose of propelling a saw-mill. The plaintiffs were the prior appropriators of the waters of the stream, at the point where their dam, at the head of their ditch, is located. The defendants' dam and ditch were constructed subsequently

¹ *Atchison v. Peterson*, 1 M. R. 583; *Phoenix Co. v. Fletcher*, 23 Cal. 482; *Post Water*; *Hill v. King*, 4 M. R. 533; *Qualified Pilot Rock Co. v. Chapman*, 11 Cal. 162.

to those of plaintiffs. The ditch of plaintiffs is some forty-eight miles in length, and that of defendants about twenty miles. The waters of the stream, diverted by the dam and ditch of defendants, after being used for mining and milling purposes, are returned again into Bear river, about seven miles above the head of plaintiffs' ditch, except such portion as is consumed by absorption and evaporation. The jury found, specifically, that plaintiffs, by the act of defendants, had lost twenty inches of water per day, for ninety days, during the year 1855, and that the value was one dollar per inch per day. That defendants did detain the water, and cause the same to flow irregularly, and that plaintiffs were damaged by this cause seven hundred and fifty dollars; that defendants did adulterate the water, and plaintiffs sustained damage from this cause to the amount of three thousand dollars; that defendants did not materially waste and destroy the water, but used it in a reasonable manner, and with the least injury to the plaintiffs consequent upon its use, and it could not have been used in any other reasonable manner—and that defendants are entitled to the surplus water of Bear river, to the capacity of their ditch. Upon the facts as partly admitted by the parties, and partly found by the special verdict of the jury, the plaintiffs moved the court for judgment. This motion was overruled by the court, and judgment given for the defendants, from which judgment the plaintiffs appealed. The suit was commenced in November, 1855, and judgment rendered in September, 1856.

CROCKER & ROBINSON, for appellant.

E. D. BAKER and JO. G. BALDWIN, for respondent.

BURNETT, J., after stating the facts, delivered the opinion of the court, TERRY, J., concurring.

It may be said, with truth, that the judiciary of this State has had thrown upon it responsibilities not incurred by the courts of any other State in the Union. In addition to those perplexing cases that must arise, in the nature of things, and especially in putting into practical operation a new constitution and a new code of statutes, we have had a large class of

cases unknown in the jurisprudence of our sister States. The mining interest of the State has grown up under the force of new and extraordinary circumstances and in the absence of any specific and certain legislation to guide us. Left without any direct precedent, as well as without specific legislation, we have been compelled to apply to this anomalous state of things the analogies of the common law, and the more expanded principles of equitable justice. There being no known system existing at the beginning, parties were left without any certain guide, and for that reason, have placed themselves in such conflicting positions that it is impossible to render any decision that will not produce great injury, not only to the parties immediately connected with the suit, but to large bodies of men, who, though no formal parties to the record, must be deeply affected by the decision. No class of cases can arise more difficult of a just solution, or more distressing in practical result. And the present is one of the most difficult of that most perplexing class of cases.

The business of gold-mining was not only new to our people, and the cases arising from it, new to our courts, and without judicial or legislative precedent, either in our own country or in those from which we have borrowed our jurisprudence, but there are intrinsic difficulties in the subject itself that it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice. Yet we are compelled to decide these cases, because they must be settled in some way, whether we can say after it is done that we have given a just decision, or not.

The use of water for domestic purposes, and for the watering of stock, are preferred uses, because essential to sustain life. Other uses must be subordinate to these. In such cases, the element is entirely consumed. Next to these may properly be placed the use of water for irrigation in dry and arid countries. In such cases, the element is almost entirely consumed. Under a proper system of irrigation, only so much water is taken from the stream as may be needed, and the whole is absorbed or evaporated. Entire absorption is the contemplated result of irrigation. When properly used, as a motive power for propelling machinery, the element is not injured, because the slight evaporation occasioned by the use

is unavoidable, and is not esteemed by the law a substantial injury. Any number of riparian proprietors can use the water as a motive power, in succession, without substantial injury to any other, for the element is just as good for the purposes of the last, as for those of the first proprietor.

Considering the different uses to which water is applied in countries governed by the common law, it is not so difficult to understand the principles that regulate the relative rights of the different riparian proprietors. As to the preferred uses, each proprietor had the right to consume what was necessary, and after doing this, he was bound to let the remaining portion flow, without material interruption or deterioration, in the natural channel of the stream, to others below him. If the volume of water was not sufficient for all, then those highest up the stream were supplied in preference to those below. So far as the preferred uses were concerned no one was allowed to deteriorate the quality of the water. And for the purposes of a motive power, there was no use of the element that could impair its quality.

But in our mineral region we have a novel use of water, that can not be classed with the preferred uses; but still a use that deteriorates the quality of the element itself, when wanted a second time for the same purposes. In cases heretofore known, either the element was entirely consumed, or else its use did not impair its quality, when wanted again for the same purpose. And this fact constitutes the great difficulty in this, and other like cases. If the use of water for mining purposes did not deteriorate the quality of the element itself, then the only injury that could be complained of would be the diminution in the quantity, and the interruption in the flow. It is this novel use of water, and its effects upon the fluid itself, that constitute the main difficulty in this case.

In repeated decisions of this court, it has been uniformly held that the miners were in the possession of the mineral lands under a license from both the State and Federal governments. This being conceded, the superior proprietor must have had some leading object in view when granting this license; and that object must have been the working of these mineral lands to the best advantage. The intention was to

distribute the bounty of the government among the greatest number of persons, so as most rapidly to develop the hidden resources of this region, while at the same time, the prior substantial rights of individuals should be preserved. In the working of these mines, water is an essential element; therefore that system which will make the most of its use, without violating the rights of individuals, will be most in harmony with the end contemplated by the superior proprietor.

Keeping this position in view, we will proceed to examine the questions arising in this case. It has been held by this court, that the owners of a water-ditch were entitled to the exclusive use of the waters of the stream, as against all subsequent locators on the stream below the ditch. In the late case of *Hill v. King and others*, it was held that the ditch proprietor was equally entitled to the exclusive use of the water, pure and undiminished, as well against the subsequent locator above, as below, the ditch; and that the two cases were not distinguishable in any essential particular. In that case a petition for a rehearing was filed, and has not yet been disposed of.¹ The question is still, therefore, an open one.

It would certainly seem, at first view, that there could be no distinction in the two cases. But is this true? When a party constructs a ditch, and diverts the waters of a stream before the rights of others have attached below, he only takes it from one unoccupied mining locality to another. In such case, there can, as a general rule, be no substantial injury done to the mining interest of the State, or to the rights of individuals. The water is taken to a locality where it is used; and after being so used, it finds its way to other mining localities, where it is again used. The effect of the diversion is not to diminish the number of times the water may be used. In the majority of cases, it is used as often, and upon the whole, as profitably, as if it had never been diverted, but had continued to flow down its natural channels. The general usefulness of the element is not impaired by the diversion. It may be very safely assumed, that as much good, if not more, is accomplished by the diversion, as could have been attained, had such diversion never occurred. In fact, we must, in reason, presume that the water is taken to richer

¹ 4 M. R. 533.

mining localities, where it is more needed, and therefore the diversion of the stream promotes this leading interest of the State. It was upon the principle that the leading interest of the superior proprietor was attained by these diversions, that the decisions of this court sustaining them, were predicated.

But for the sake of the argument, we will take the position to be true, that the owner of a ditch at any point upon a stream in the mineral region, has the exclusive right, as against all subsequent locators above his ditch, to the use of the water, undiminished in quantity, unadulterated in quality, and uninterrupted in flow. We will, then, endeavor to see how such a theory will operate in practice. And before we do this, we must concede that as a general rule the effect of a particular construction of a statute, or the application of a certain principle, can not be used against it except in cases of reasonable doubt. If the meaning of the statute be clear, or the application of the principle well settled, courts are not disposed to consider the consequences. The legislative power is responsible for them in such cases, and relief must be sought there. But in these mining cases we are virtually projecting a new system, and if ever the practical effects of a theory could be justly considered in any case, it is apprehended it could be legitimately done in this.

It is stated by a very intelligent witness in this case, that "as rapid a stream as Bear river would carry sediment a long way;" and it may be correctly said that about the same rapidity of current is found in all the mountain streams.

If, then, we lay down the doctrine as true, that the ditch-owner is entitled to the water in as pure a state as it was at the time he constructed his ditch, the result must be that those locating above him can never use the water at all, even in cases where the upper end of the ditch taps the stream near the point where it leaves the mineral region. For as the streams are rapid, the sediment must, in greater or less quantities, come down to his ditch. The inevitable practical result must be, that the water can not be used so often, and the general usefulness of this element for mining purposes must be greatly impaired, and the leading intention of the superior proprietor be thus far defeated.

It would seem, therefore, that there is a greater difference between the two cases than would at first appear. But this difference is greater still, when we come to consider other cases that must arise. Suppose the ditch only takes from the stream a portion of the volume, say, for example, one tenth, the remaining portions are left to flow down the natural channel, and may or may not be used as they may or may not be needed below. But in such a case, what are those who afterward locate above, on the same stream, to do? If they use any portion of the water, it becomes charged with sediment that must mingle the whole volume of the stream, and the water, thus deteriorated, must flow to the ditch. And if the principle is sustained that the water must flow pure to the ditch, then the nine tenths can not be used above the ditch for mining purposes; and because the ditch-owner has taken away a portion only of the stream, must the use of the other nine tenths be lost to all?

After the most careful and anxious consideration of this most difficult subject, the following conclusions occur to me as the nearest practicable approach to a fair and equitable adjustment of this matter.

1. The ditch-owner is entitled to have the water flow, without material interruption, in its natural channel. This right would seem to be compatible in general with the fair use of the water above.

2. He is entitled to the water, so undiminished in quantity, as to leave sufficient to fill his ditch as it existed at the time the locations were made above. This right is essential to the protection of the ditch-owner. If we lay down the rule that the subsequent locators above may so use the water as to diminish the quantity, it would be difficult to set any practical limits to such diminution, and the ditch-property might be rendered entirely worthless. As the water can not be absorbed or evaporated at once, the ditch-owner should be entitled to its exclusive use in such a case.

3. And as to the deterioration in quality, the injury should be considered as an injury without consequent damage.

For these reasons, I think the judgment of the court below should be reversed, and the cause remanded for further proceedings.

Reversed.

HILL V. KING ET AL.

(8 California, 337. Supreme Court, 1857.)

Subsequent locators above and below. The first appropriator of water should be protected in his rights, as well as against subsequent locators above as below him. He who has first diverted the waters of a stream and appropriated them to his own use is entitled to the exclusive enjoyment of the same, pure and undiminished. The use of the water by subsequent locators above him must be reasonable and the injury or diminution small or inconsiderable.

Appeal from the District Court of Placer County, Eleventh Judicial District.

The plaintiffs in this case were the owners of two water-ditches leading the waters of Indian cañon to various mining localities that were constructed in 1852. In 1855, the defendants took possession of certain mining claims on Indian cañon, at a point about one mile above plaintiffs' dam, and commenced working them, by the sluicing process, and in so doing, washed down large quantities of mud, gravel, and sediment, into the bed of the cañon, which sediment, etc., was carried into plaintiffs' ditches by the water used by the defendants in sluicing, whereby the ditches of plaintiffs were filled up, and also plaintiffs' reservoirs, and the water rendered so thick and muddy that it was almost valueless for mining purposes. There was testimony on the part of the defense going to show that defendants had worked their claim in a reasonable manner, and had used water coming from another cañon. On the trial, plaintiff asked the court to instruct the jury as follows, which being refused, an exception was duly taken:

"That if plaintiff had constructed his ditches, and appropriated the waters of Indian cañon, and was using said water, for sale for mining purposes, and defendants subsequently located mining claims near the bank of said cañon, and above the head of plaintiffs' ditches, and in working said claims, they, the defendants, occasioned a material and essential injury to the waters of said cañon, so that their value

¹ Compare *Bear River Co. v. New York Co.*, 4 M. R. 526.

was materially and essentially impaired for the mining uses to which they were being put by plaintiff, such acts are sufficient to entitle the plaintiff to his action. And although defendants may have worked their claims in the most practicable and reasonable manner, and may have done no more damage than it was necessary to do in order to work their claims, yet the plaintiff was entitled to recover from them to the extent of the damage done by them."

Judgment for defendants. Plaintiff moved for a new trial, which being denied, he appealed.

This case was decided at the July term of this court, but was retained on a petition for a rehearing.

HALE & HILLYER, for appellant.

CHARLES A. TUTTLE, for respondents.

At the July term, MURRAY, C. J., delivered the opinion of the court, BURNETT, J., concurring.

The only question involved in this case is, whether the proprietors of a water-ditch can maintain an action against the subsequent locators of mining claims for a deterioration or diminution of water so appropriated.

It has been repeatedly held by this court, that as against those locating below the head of a ditch or point where the water is diverted from the stream, the owners of such ditch, if their appropriation of the water was prior to the location of mining or other claims, had a superior right, and might protect it by the ordinary remedies known to the law. The only difference between this case and those heretofore decided, consists in the fact that the defendants' claims are above, and not below the head of the plaintiff's ditch.

It is difficult to discover why the principle which governs one case should not be equally applicable to the other, or why, if the law gives to the first appropriator a right to the use of the water, pure and undiminished, as against the subsequent appropriator below, he should be allowed by a mere change of position to evade the consequences of the rule, and to place himself in a position which would destroy the rights of the first appropriator.

The right to appropriate the waters of the streams of this

State, for mining and other purposes, has been too long settled to admit of any doubt or discussion at this time. Some of the older English authorities held that a right to water might be acquired by a riparian proprietor, by appropriation, and this court might, with propriety, have maintained the rights of water companies, on the ground that they were riparian owners; but it has based this right on the ground that the legislation of the State has given to every one, not only the privilege to work the "gold placers," but also to divert the streams for this and other purposes. The legislation of the State has been held to amount to a "a general license to all," (whether properly, is not for me to say, the point having been decided by a majority of the court against my own opinion—see *Conger v. Weaver*, 6 Cal. 548), and when these ditches have been constructed, they are regarded as a franchise or easement belonging to the proprietors, and are entitled to protection as any other property.

The only test as between parties, where the lands belong to the United States or this State, is priority of location, and whether a party locates above or below the claim of another; his right depends or originates in appropriation alone; he must take, subject to the higher right of those who were first in point of time to appropriate. If the parties both claimed as riparian proprietors, then each alike would be entitled to the reasonable use of the water for the proper purposes. But in such case the *supra* riparian proprietor must so do the same as to do his neighbor the least possible injury, and the general rule is, that each riparian proprietor is entitled to the free use of the waters, pure and undiminished, except the deterioration or diminution be so slight or unimportant as not to materially diminish the quantity or quality.

Testing the case by this rule, it might be asserted with confidence, that the facts of this case warranted a recovery. But when it is taken into consideration that the parties do not claim as owners of the soil, that none of the rules applicable to riparian proprietors apply, and that they both ground their respective rights upon their location, then the rule which has been so often laid down by this court must apply, and he who has first diverted the waters of a stream, and appropriated them to his own use or purposes, must be

held entitled to the exclusive enjoyment of the same, pure and undiminished. By this, we do not mean to say that those above him can not use the water for any purpose; the use must be a reasonable one, and the injury or diminution small or inconsiderable. Any other rule would destroy this interest entirely as it would enable any person, by locating above the head of a ditch, to destroy the value and utility of the same, and no man could count with safety upon his enterprise, unless he commenced at the source of the stream. The opposite rule would apply as well to the diversion, as to the deterioration of the water, and after large sums had been expended in constructing a ditch, any one might render the same worthless by locating above, and asserting his right to divert the water. From these views it results that the instructions of the court below were erroneous.

Judgment reversed, and cause remanded.

On the application for a rehearing:

BURNETT, J.—This case was decided at the last term, and the opinion of the court was delivered by the late Chief Justice, in which I concurred. Since that opinion was delivered a petition was made for a rehearing by the counsel of defendants, and the case of the *Bear River Company v. The New York Company*, 8 Cal. 327, has been argued and submitted. Upon more full and mature consideration, I think the former opinion of the court should receive some qualification. My views may be found in my opinion in the case of the *Bear River Co. v. New York Min. Co.* The petition for a rehearing should be denied.

Reversed.

WHITE ET AL. V. TODD'S VALLEY WATER COMPANY.

(8 California, 443. Supreme Court, 1857.)

Enlargement of ditch. The plaintiffs sought to recover on the ground that defendants had enlarged their ditch since the commencement of plaintiffs' ditch: *Held*, that defendants were not limited to the quantity of water they had turned into their ditch in the first instance, unless

by the general plan, size and grade of the ditch, it was not capable of carrying more water than was then diverted.

If by reason of obstructions, or irregularity in grade, it was not capable of conveying as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove the obstructions, and then might fill the ditch to its capacity. But a failure for an unreasonable length of time to remove the obstructions or adjust the grade and to divert more water through their ditch would limit them to the amount first diverted.

Verdict against evidence—Conflicting testimony. The Supreme Court will not disturb a verdict on the ground that it is against the evidence when the testimony is conflicting.

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

The defendants, a corporation for mining purposes, constructed a ditch, in 1851, taking water from the Volcano cañon. In 1852, the plaintiffs, or those under whom they claim, constructed their ditch, tapping the same stream at a point a short distance below. In their complaint, the plaintiffs allege that the ditch of defendants had been so enlarged since the date of the commencement of plaintiffs' ditch, as to increase the volume of water running therein, to the injury of the plaintiffs. This allegation is denied in the answer. Upon the trial in the court below, the jury rendered a general verdict for defendants. The plaintiffs moved for a new trial, which being overruled, they appealed to this court.

The grounds of error assigned appear in the opinion of the court.

TUTTLE & MYERS, for appellants.

HALE & HILLYER, for respondents.

BURNETT, J., delivered the opinion of the court, TERRY C. J., and FIELD, J., concurring.

There are two errors assigned by the plaintiffs:

1. That the verdict was against the evidence.
2. That the court erred in giving and refusing instructions.

In reference to the fact as to whether the ditch of defendants had been enlarged so as to increase the flow of the water, the testimony was conflicting. The evidence fills some fifty-two pages of the transcript, and there was ample room al-

lowed for the exercise of the discretion of the jury. It would be exceedingly difficult for any one to come to a satisfactory conclusion as to the real state of the case. And this uncertainty arises from the nature of the subject-matter, and the want of exact estimates at the time. We therefore can not disturb the verdict upon the first ground assigned.

On the trial, the court gave this instruction: "In determining the quantity of water in the cañon, appropriated by defendants at the time of the construction of their ditch, which is conceded to have been constructed prior to that of plaintiffs, you will ascertain their intentions from their acts, the manner in which their ditch was constructed, the plan of the work, the general size, etc.

"They would not be limited to the quantity they have turned into their ditch in the first instance, unless by the general plan, size and grade of the ditch, it was not capable of carrying more water than was then diverted.

"If by reason of boulders or stones in the sides and bottom of the ditch, or irregularity in the grade at that time, it was not capable of conveying as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. But if they continued to divert the quantity only that they originally turned into their ditch a sufficient length of time to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove such obstructions or adjust the grade of their ditch, they would be limited to the amount thus directed, and the plaintiffs would be entitled to the residue."

The plaintiffs excepted to the giving of this instruction, and offered the following, which the court refused to give, and the plaintiffs excepted:

"What amount of water of Volcano cañon was in the possession, or actually appropriated by defendants or those under whom they claim, at the time of the completion of plaintiffs' ditch, and the actual appropriation of the waters of said cañon by plaintiffs, or those under whom they claim."

We think the instruction given by the court was correct, and entirely applicable to the state of facts proved before the

jury. And it follows that if the court was correct in giving the instructions, the refusal to give the one offered by plaintiffs was no error.

Judgment affirmed.

BROWN V. SMITH.

(10 California, 508. Supreme Court, 1858.)

Practice—Verdict of jury. In an action for the diversion of water, the Supreme Court will require a case of very palpable mistake or error to be made out, before it will overrule the verdict of the jury on issue of fact joined.

¹ **Diversion of water from choked ditch.** In such an action, where both parties claimed water from the same stream: *Held*, that defendant was not liable for deficiency of water in plaintiff's ditch, unless defendant was diverting more water than he was entitled to, at the precise time that such deficiency existed. *Held further*, that plaintiff could not recover for alleged diversion of water from one of his ditches, if the jury believed that at the time of the alleged diversion such ditch was so filled up with tailings that it was incapable of carrying off the water itself.

Surprise as ground for new trial—Nonsuit. A motion for new trial will not be allowed on the ground of surprise, if ordinary prudence would have guarded against such surprise; besides, the plaintiff could have taken a nonsuit under § 148 of the Practice Act.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

This was an action to recover damages for the wrongful diversion of water from the plaintiff's ditch, and for an injunction restraining the defendant from the continuation thereof.

The complaint is in three counts.

The first count alleges that plaintiff, and those under whom he claims, located, took up, and appropriated the waters of Rabbit creek, in the county of Sierra, for the purpose of conveying the waters of the creek, and the intermediate waters flowing therein, to Spanish Flat, where the same were to be sold by plaintiff for mining purposes. That the appropriation of the waters by plaintiff was by means of a dam and ditch, commenced on the last day of November, 1853, and

¹ Approved, *Nevada Co. v. Kidd*, 37 Cal. 313.

subsequently completed. Ditch conveyed 420 inches of water three months in the year, which was worth to the plaintiff \$360 per day.

On the first day of March, 1857, defendant wrongfully and illegally constructed a dam and ditch, and appropriated the waters of Rabbit creek to his own use, and thus prevented the waters from flowing into plaintiff's ditch, to damage of plaintiff of \$12,000.

Second count: Plaintiff was, on the first day of March, 1857, and still is, the owner and entitled to the possession of the waters of Rabbit creek, by appropriation, to the extent of 700 running inches, which water flowed through his ditch, called the Irish ditch, to Spanish Flat, and was there sold by plaintiff at the rate of \$7.50 per day, for one sluice-head of twelve running inches. Defendant, by means of a dam and ditch constructed by him, caused the water to flow from and out of plaintiff's ditch, and deprived him of the use thereof. Damage, \$5,000.

Third count: Plaintiff is the first appropriator of the waters of Rabbit creek to the extent of 35 and 75 sluice-heads, each sluice-head being twelve inches, and flowing into plaintiff's two ditches, one called the O'Brien and Brown ditch, and the other the Irish ditch, from the first of March to the middle of June in each and every year, for mining purposes. That defendant entered in and upon the same, and deprived the plaintiff of the enjoyment thereof; and, if not prevented, will destroy irretrievably all of plaintiff's just and legal rights, etc.

Complainant prays for judgment for \$17,000 damages, and for an injunction to restrain defendant, etc. The complaint is verified.

Defendant, in his answer, specifically denies the allegations of plaintiff's complaint, and sets up a right, by prior appropriation, to the possession and use of eighty sluice-heads, or nine hundred and sixty running inches of the waters of Rabbit creek, and the tributary ravines, which he conveyed through his ditch to Secret Diggings and adjacent mining localities, and there sold the water for mining purposes, etc. The cause was tried by a jury.

On the trial, and after the close of the testimony and argu-

ment, the court, among other instructions to the jury, gave the following:

"7. The defendant is not liable for any deficiency of water in plaintiff's ditch, unless he (defendant) was diverting from Rabbit creek more water than he was entitled to at the precise time that such deficiency existed.

"8. If the jury believe that Brown's Old Ditch, so-called, was so filled with tailings during the water season of 1857, that it was incapable of diverting any of the waters of Rabbit creek, then plaintiff can not recover for the water for that ditch.

The jury returned a verdict for the defendant. Plaintiff moved the court for a new trial, which was denied, the court rendering the following opinion:

"Upon the motion for a new trial, plaintiff files his own affidavit, in which he sets forth that he was surprised at the testimony of the witness Roberts, who testified, among other things, that from March 2d to June 14th, 1857, not over five hundred and forty-five inches of water was running and sold from defendant's ditch per day, and that a portion thereof came from the ravines, and not from Rabbit creek; and the affidavit further sets forth that plaintiff was surprised at the testimony going to show that there was water running to waste below plaintiff's dam. Upon the trial of the cause, it was admitted that defendant's ditches had priority over plaintiff's, but plaintiff contended that defendant's ditches had been enlarged subsequent to the construction of his, and that defendant had by means of such enlargement, diverted more water than he was entitled to, to the injury of plaintiff. Defendant's counsel, on the trial, admitted that the lower part of his ditch had been enlarged in 1856, after plaintiff's ditches were constructed. Under the issues made, it was incumbent on the plaintiff to prove that defendant had diverted more water from Rabbit creek than he was entitled to, and that he (plaintiff) had been injured thereby, and to prove such facts a number of witnesses were called; and the witness Roberts, called on the part of defendant to show the quantity of water run in defendant's ditches, stated that they sold a certain number of inches, and that they sold all that was run in the ditch. This testimony was responsive to the issues made

in the case, and simply contradictory of what plaintiff's witnesses had—some of them—testified to; for it will be borne in mind that the witness referred to the quantity sold, and stated that it was all sold that run, for the purpose of showing how much did actually run through the ditch, upon the same principle that plaintiff's witnesses described the size of the ditch and the height of the volume of water running therein, to establish the same facts. 'Ordinary prudence' should certainly have led plaintiff to guard against such surprise as this, and if, on the trial, he believed the statement of Roberts to be untrue, and was not then prepared to show it, he should have taken a nonsuit, under the one hundred and forty-eighth section of the Practice Act: See *Live Yankee Company v. Oregon Company*, 7 Cal. 40; *Willard v. Wetherby*, 4 N. H. 118."

Judgment was entered for the defendant, and the plaintiff appealed to this court.

FRANCIS J. DUNN, for appellant.

VANCLIEF & STEWART, for respondent.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., concurring.

This case is an action for the diversion of water. It seems to have been closely contested on the facts, and the proof was conflicting. The jury, after hearing all the testimony, found for the defendant.

This is precisely one of those snits which a jury of the vicinage are best qualified to try, and they seem to have tried it fairly, under the direction of a judge entirely familiar with this class of litigation, and who refused the application for a new trial.

This court would require a case of very palpable mistake or error to be made out before it overruled the verdict of the jury on issue of fact joined in such an action; and certainly no such case seems to be made by this record.

We think the court below did not err in the instructions given. The seventh and eighth, given at the instance of the defendant, are the only ones which appear to be assailed with

much confidence. And these, when considered in connection with the peculiar facts of this case, we think correctly state the law.

The motion for a new trial, founded on the plaintiff's affidavit of surprise, was correctly overruled. The reasons given in the written opinion of the judge below, to be found in the record, are conclusive upon this subject.

Judgment affirmed.

WEIMER V. LOWERY ET AL.

(11 California, 104. Supreme Court 1858.)

Title in United States, and utility—No defense to nuisance. In an action to abate a nuisance, to wit, a ditch constructed across the land of another without his consent, it is not a good defense for the ditch claimants that the plaintiff has no title from the United States, that his inclosure is part of the public domain; nor can they set up in their answer as a defense the great cost of the undertaking, its great length, or its utility, or the fact that it is constructed for mining purposes.

Newly discovered evidence as ground for new trial. A new trial will not be granted on the ground of newly discovered evidence, which consists of a deed recorded in the recorder's office twelve months prior to the trial, and a record of a judgment in the same court in which the cause was tried.

Appeal from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action under the 249th section of the Practice Act.

Complainant alleges that he is the owner and in possession of a lot of ground in Coloma, on which he has a family residence and cultivates a garden and orchard; that defendants, against his will, had dug a ditch across a portion of the lot for the purpose of conveying water; that by the cutting of this ditch and throwing the earth from it over a portion of his lot, it was rendered unfit for cultivation; that his property is injuriously affected, and his use of it obstructed by the ditch of defendants. He therefore asks that it be abated as a nuisance.

Defendants' answer denies the ownership of the plaintiff; upon information and belief, denies that plaintiff had ex-

pressly forbid the construction of the ditch; but admits that he requested them to take it across the lot at a different point.

They deny that the land is injuriously affected by the ditch; but aver that it is benefited by it. Defendants also allege that the land in question was situated in the mining region; was the property of the United States, and that their ditch was constructed in 1855, for the purpose of conveying water to be used for mining purposes from the American river to gold mines in the neighborhood of the premises; was fourteen miles in length, and had cost \$20,000.

The allegations were, on motion, stricken out by the court as irrelevant; the cause was submitted to a jury, who found that plaintiff was the owner, and in possession of the premises at the time the ditch was constructed; that it was cut on his land without his consent, and that the ditch injuriously affected the lot, and interfered with its comfortable enjoyment by plaintiff.

Upon this verdict a judgment was rendered, requiring the nuisance to be abated. Defendants moved for a new trial, which was overruled, and appeal taken.

SANDERSON & HEWES for appellants.

1st. The court below erred in striking out that portion of the answer which alleges that the lot claimed by the respondent, and upon which the pretended nuisance was created by appellants, was in the heart of the mineral region, and was public land, and had never been conveyed by the government to respondent or any of his grantors.

2d. The court below erred in striking out that portion of the answer which alleges that appellants' ditch was dug in the summer of 1855, and has been used ever since, and still is, for the purpose of conveying the waters of the south fork of the American river from a point about five miles above respondent's lot to gold mining localities lower down, and in the vicinity of said stream, there to be used for gold mining purposes; that the ditch is fourteen miles long, and was constructed at a cost of \$20,000.

3d. The only facts upon which the judgment is based are found in the special verdict, which is as follows:

"We the jury find:

"*First*—That the plaintiff was the owner and in possession of the lot of land described in the complaint at the time defendants' ditch was dug, and is still the owner.

"*Second*—That such ditch was dug through said lot by defendants, and without the consent of plaintiff.

"*Third*—And that said ditch does interfere with the comfortable enjoyment of said lot, and injuriously affects said lot."

These facts are insufficient to sustain the judgment of the court below, directing the abatement of appellants' ditch.

4th. The court below erred in refusing a new trial, because the statement and affidavits, the deed from Gordon to Weimer (which action was brought to enforce a vendor's lien), all show that the respondent was not the owner of the lot at the time the ditch was dug.

As to first point. The action of the court below in striking out those parts of the answer specified in the first and second points above set forth, can only be sustained upon the ground that they are sham or frivolous. A sham answer and defense is one that is false in fact, and not pleaded in good faith. "A frivolous answer is one that shows no defense, conceding all that it alleges to be true": *Brown v. Gimsan*, 1 Code Rep., N. S., 1856. It is not contended that the portions stricken out of the answer in this case come within the definition of a sham answer given above; but it is contended that they come within that of a frivolous answer, and therefore we shall confine our attention to the latter question.

This action grows out of an alleged nuisance. In such actions damages may be recovered, or the nuisance abated, or both may be done: Pr. Act, sec. 249. So far as the abatement of the nuisance is concerned, it is a chancery action. "The action may be enjoined or abated." This leaves it to the discretion of the court; and whether the court will do either or not depends entirely upon the equity of the case. As to its being in the discretion, see *Bemis v. Clark*, 11 Pick. 452, where a similar statute is construed.

For the purpose of enabling the court to exercise its discretion understandingly and equitably, it was proper to plead the matters in question; for if the plaintiff sustained but trifling injury from the alleged nuisance, which could be read-

ily compensated in damages, and an abatement of the nuisance would operate to the irreparable or great injury of the defendants, equity requires that the plaintiff should be content with his damages, and the court should exercise its discretion accordingly. Hence, the fact that the land was public land and that the works of defendants were of great value and importance—were properly pleaded, for the purpose of enabling the court to render such a judgment as equity between the parties should dictate. The plea of public land was proper, for the reason that, if the ditch was dug prior to plaintiff's title, he took it as he found it, and subject to all rights antecedently acquired: *Crandall v. Woods*, 8 Cal. 136.

The court below has, however, acted upon the hypothesis that the fact of nuisance being determined, it followed of course, as a matter of law, that the nuisance must be abated, regardless of consequences. In this the court was mistaken, as we shall endeavor to show hereafter, and consequently erroneously struck out those parts of the answer in question.

As to the second point, to wit, insufficiency of the facts found to sustain the decree. The facts are, that plaintiff was the owner at the time the ditch was dug, and is still; that the ditch was dug *without* his consent, and that it injuriously affects the lot, etc. No damages are found, notwithstanding they are prayed for in the complaint. The jury do not find that, at the time the ditch was dug, the plaintiff forbade the defendants from digging it, but that they dug it *without* his consent. What is the meaning of the words "Without his consent?" Does it mean that he forbade them? Most certainly not: the words certainly convey no such idea. The meaning is simply that the defendants dug the ditch without first obtaining the plaintiff's permission, or that he gave no *express consent*. The most latitudinous interpretation of the words can not assign them any other meaning. If we are correct in our understanding of the verdict, the plaintiff occupies the position of standing silent, while the defendants were engaged in constructing the ditch, and is now estopped. Having stood silent, and suffered the defendants to expend their labor and money without objecting, he can not now disturb their enjoyment of it: 6 Ad. & El. 469; 9 B. & C. 586; 3 B. & Ad. 318, note a; 3 Johns. Ch. Rep. 116.

But concede, for the sake of the argument, that the true meaning of the verdict is that the respondent forbade the appellants to dig the ditch; even then we say that the facts do not sustain the judgment. In order to show himself entitled to abatement of the ditch, the plaintiff must show it to be such a nuisance as a court of equity would enjoin: he must show such an injury as can not be compensated in damages. He has entirely failed to show such a case. For the two years during which this pretended nuisance has existed, he has claimed only three hundred dollars damages; and the jury, upon his own showing, refused him any damages. The injury, upon the plaintiff's own showing, and according to the verdict, is of the most trifling character. Courts of equity will not interfere, unless the trespass produces irreparable injury or great mischief. It is not every technical nuisance that a court of equity will abate; but where the injury is trifling, and can be fully compensated in damages, it will leave the party to his judgment at law for damages; and more especially, as in this case, where an abatement would result in a great and irreparable injury to the opposite party: *Bemis v. Clark*, 11 Pick. 452.

"When an injury will admit of a pecuniary compensation, a court of equity will never interpose": *Ingraham v. Durnell*, 5 Met. 118.

As to the fourth point, to wit, the court erred in refusing a new trial. The judgment roll in *Gordon v. Weimer* shows that that action was brought to foreclose a vendor's lien. The present plaintiff allowed judgment by default in that case. This, taken in connection with the conveyance from Gordon, shows that the plaintiff was not the owner of the lot at the time the ditch was dug; if so, he could not maintain the action until after he had formally notified the defendants to abate the nuisance: *Lupton v. McLincoln*, 1 Stew. 133.

THOS. H. WILLIAMS, for respondent.

Our statute prescribes that an answer, among other things, may contain "any new matter *constituting a defense* to the action": Wood's Dig., p. 173, sec. 46.

And provides that "irrelevant and redundant matter con-

tained in a pleading may, upon motion, be stricken out": page 174, sec. 57.

And defines a material allegation to be "one essential to the claim or *defense*, and which could not be stricken out without leaving the pleading insufficient."

Irrelevant matter and redundant matter is such, which, if taken as true, does not constitute a cause of action or a *defense* to the action.

This court has again and again decided that a defendant in an action respecting land, would not be permitted to set up outstanding title in another, or in the government, and that as between individuals, possession should be held "*prima facie*" evidence of title; then clearly the court below was correct in striking out the allegation that the land belonged to the government, and that the government had not conveyed to plaintiff, because, if true, the facts stated constituted no defense.

The same may be said in regard to the other matter stricken out, for this court has often decided that a trespasser upon the rights of another, who is digging a ditch, can not justify that he intends the water for mining purposes; and the value of his ditch is immaterial, as the dollars and cents in question can not affect the rights of the parties: *Fitzgerald v. Urton*, 5 Cal. 308; *Tartar v. Spring Creek Water and Mining Co.* 5 Cal. 395; and *Burdge v. Underwood*, 6 Cal. 45.

I invite special attention to the last case cited, as it is more directly in point, than cases are usually found.

The cause of action, the judgment sought, the facts in the case, and the judgment rendered, agree precisely with this case, with this exception: the court there finds one hundred and fourteen dollars damages, the cost of filling the ditch, while in this case the judgment requires the defendants to fill it at their own cost, or if they fail to do so, the sheriff shall fill it at defendants' cost, which will amount to a greater sum than the one hundred and fourteen dollars in the other case.

I might here rest the case, but as counsel for appellants have seen fit to encumber the record with other questions, it may not be improper to briefly notice some of them.

They say "that the plea of public land was proper, because

if the ditch was dug before plaintiff took up the land, he took it as he found it, subject to all rights," etc.

This is a fair specimen of the defense, and can be answered in two ways:

1st. If defendants dug the ditch before plaintiff's location of the land, they should have positively and unequivocally averred the same, and not reach it by saying that the land *belonged* to the government.

2d. The complaint charges that plaintiff became the owner and possessor of the land in 1852, and that he was in possession when defendants commenced digging their ditch in 1855; and defendants do not deny either allegation—on the contrary, the answer admits the possession.

Appellants' counsel quibble as to whether the jury meant that plaintiff forbade the defendants' entry upon his lot; but conclude at length that the question is immaterial.

The verdict must be taken in connection with the pleadings, and it will be found that the only issue made upon this branch of the case was, whether defendants entered against the will of plaintiff; and upon that point the jury find for plaintiff. It will be observed that the denial of defendants is evasive, and that they do not even notice the allegation which charges that plaintiff has frequently requested a removal of their works, and that the ditch be filled.

But they say that plaintiff stood by—saw their work going on without forbidding it—thereby tacitly consenting to the trespass.

To which there are two answers:

1st. The entry by defendants was "*prima facie*" a trespass, and *they* must show consent, either express or implied, in defense. They fail to charge the same in the answer, to prove it, or to show it by the verdict.

2d. The jury find generally the entry against the *consent* of plaintiff, which according to strict language includes both express and implied consent, and the presumption is, that they intended their language to be understood in its ordinary acceptance.

Appellants contend, however, that conceding this a nuisance, still it is not such a one as should be enjoined or abated.

Upon this subject I understand the following to be the correct rules of law:

1st. That every trespass or injury, however slight, is the subject of action.

2d. That an injury which would merely entitle the party to nominal damages is not such as would authorize an injunction or abatement.

3d. That where the injury is more than nominal, and interferes with the comfortable enjoyment of property, courts of equity will interpose and prevent its continuance.

Having discussed this subject at some length in the case of *Harvey v. Chilton* (11 Cal. 114), at this term, I shall forbear extending my remarks at this time, but respectfully refer the court to that case and the authorities there cited, both by the counsel on the other side and myself.

In this case, the jury returned a verdict finding, in the language of the act, that the ditch complained of does injuriously affect plaintiff's lot, and interferes with his comfortable enjoyment of it. And having so found, it was then in the discretion of the court to abate the nuisance; and I presume this court will not say that such discretion was improperly used.

The complaint describes the character of the ditch, and shows its effects upon the land, and the answer does not controvert such description, from which it appears that a strip of plaintiff's lot, from one side to the other, and from four feet to ten or twelve wide, is rendered unfit for use so long as the ditch may remain on it, and necessarily it is inconvenient to pass over the ditch, which can only be done by small bridges, to cultivate the northern part of the lot.

Again calling attention to the case of *Burdge v. Underwood*, cited, I leave the case with a suggestion or two in reference to the motion for new trial.

This motion is made upon the ground of newly discovered evidence, to wit, that Weimer was not the owner of the land upon which the nuisance was created.

The answers to this motion are more numerous than necessary to state, and I will therefore only give:

1st. The affidavit is made only by one defendant, when there were many, and does not pretend that the newly dis-

covered testimony was unknown to his co-defendants. It is true, he says that he had the *chief* defense of the case, and I presume that his co-defendants did the *small* work.

2d. The deed and record which he exhibits shows that the deed from Gordon to Weimer was executed and filed in the county recorder's office nearly one year before the commencement of this action, and the suit of *Gordon v. Weimer* had been terminated before this was commenced. How, under the circumstances, attorneys could have induced their client to swear that he by "due diligence" could not have discovered the evidence before trial, I can not understand.

3d. Weimer shows by his answer that, in fact, the land was his long before the deed was executed, the latter being withheld until the purchase money should be paid.

4th. Possession is sufficient to maintain the action against a *continuance* of the nuisance.

5th. The application should show that the evidence is *new material*, not *cumulative*; has been discovered since the trial, and could not have been, by due diligence, discovered before trial, and will not be granted if the facts stated are fully controverted by counter affidavits: *Bartlett v. Hogden*, 3 Cal. 55; *Brooks v. Lyon*, Id. 113; *Burritt v. Gibson*, Id. 396.

TERRY, C. J., after stating the facts, delivered the opinion of the court, FIELD, J., concurring.

The assignments of error are, *first*, in striking out part of defendants' answer; *second*, that the verdict of a jury did not warrant the judgment; and *third*, refusal of the court to grant a new trial on the ground of newly discovered evidence.

The first point is not well taken. It has never been held that a trespasser upon lands in the possession of another can justify his acts by setting up an outstanding title, in which he has no privity. Nor has it ever been decided that the fact that a party is engaged in the construction of a work requiring a large pecuniary expenditure, will justify a trespass on private property. The allegations were properly stricken out as irrelevant because it is true, they constituted no defense to the action.

The second point is answered by the decision of this court

in *Burdge v. Underwood*, 6 Cal. 45, the findings of which are entirely analogous to the special verdict in this case.¹

The third objection is that the court erred in refusing a new trial, on the ground of newly discovered evidence. The evidence set out in the affidavit consisted of a deed which had been recorded in the county recorder's office more than twelve months prior to the trial, and the record of a judgment in the same court in which the cause was tried; and we are not able to perceive why this evidence could not as well have been discovered before the trial, by the exercise of the slightest degree of diligence.

Judgment affirmed.

THE BUTTE CANAL AND DITCH CO. v. VAUGHN.

(11 California, 143. Supreme Court, 1858.)

² Reclamation after flowing back into natural stream—Mingling waters.

V. turned certain water which he had appropriated into a natural ravine, whence it flowed into Jackson creek, and mingled with the waters of that stream, but after descending about a mile, was again taken up at a point above The Butte Co.'s claim and diverted by V. to his mining claim. The Butte Co. brought suit for diversion: *Held*, that the prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. *Held further*, that the water introduced by V. did not necessarily become subject to the use of the Butte Co., because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties after such mingling are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity.

Burden of proof. The burden of proof rests upon the party causing the mixture. He must show clearly to what portion he is entitled. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

Case distinguished from abandonment. The case distinguished from one in which the water once diverted is allowed to find its way back to the stream by the natural level of the country so as to indicate an abandonment of it.

¹ 4 M. R. 517.

² Mingling oil in pipe line: *Hutchison v. Com*, 4 M. R. 208.

¹ **Rights of prior appropriator.** The first appropriator of the water of a stream passing through the public lands in the State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters, and divert an equal quantity, as often as they choose.

Appeal from the District Court of the Fifth Judicial District, County of Amador.

This was an action for the diversion of the waters of the south fork of Jackson creek in the county of Amador. Plaintiffs claimed under the first appropriator of the waters of said stream. Defendant in his answer set up a right to a portion of the water, by virtue of a contract with the owners of the Amador county canal, which drained the north fork of the Mokelumne river. From this canal, the water claimed by defendant was emptied into a natural ravine, and from thence flowed into the south fork of Jackson creek, above the dam of plaintiffs, and after descending the stream for a mile, was again taken up at a point above the plaintiffs' dam and diverted through defendant's ditch to his mining ground. Plaintiffs demurred to this portion of the defendant's answer as *new matter*. The demurrer was sustained by the court below, and the defendant appealed. The material facts sufficiently appear in the opinion of the court.

W. W. CORE, for appellant.

ROBINSON, BEATTY & HEACOCK, for respondent.

FIELD, J., delivered the opinion of the court, TERRY, C. J., and BALDWIN, J., concurring.

The plaintiffs claim under the first appropriators, the right to the waters of the south fork of Jackson creek, in the county of Amador, and previous to and at the time of the diversion by the defendants, which is the occasion of this suit, were the owners of a line of ditch and of flumes and aque-

¹ *Columbia Co. v. Holter*, 2 M. R. 14.

ducts into which, by means of a dam constructed across the stream, they diverted the waters from the natural channel of the fork, and conducted the same to adjacent mining ground to be used for mining purposes.

The defendants are the owners and in possession of valuable mining ground situated on the north side of the fork, and are endeavoring to obtain the requisite supply of water for its successful working from the north fork of the Mokelumne river and its tributaries, through the Amador county canal, under a contract with the owners of the canal. For that purpose the water is conducted from the canal by artificial channels to a natural gulch or ravine, from which it is emptied into the south fork of Jackson creek, above the dam of the plaintiffs. About a mile below the point where the water is thus emptied, the defendants have constructed a ditch leading to their mining ground, into which, by means of a dam at its head thrown across the fork, they divert a portion of the waters flowing into the channel, and it is this diversion which is the subject of complaint in this suit. The quantity of water diverted does not equal the quantity emptied into the fork from the Amador county canal through the ravine or gulch designated. Upon these facts the single question is presented whether the defendants, after the mingling of the water conducted by them from the canal with the waters naturally flowing in the fork, possess the right to take out an equal or less quantity from the stream—or is the right of the defendants to the use of the water while in the ravine, or to the use of an equal quantity, lost by its subsequent mingling with the natural waters of the fork?

This case is similar in its material features to that of *Hoffman v. Stone*, 7 Cal. 46. In that case the plaintiffs were the prior appropriators, and as such entitled to the waters of a stream called Dutch gulch, the channel of which was dry at certain seasons of the year. This channel the defendants used as a connecting link between two canals constructed by them, emptying their waters by one canal into the channel, and subsequently diverting them by means of a dam into the other. The plaintiffs in that case, who were the owners of a ditch which received its supply of water from the creek, obtained a judgment perpetually enjoining the defendants from divert-

ing the water from the main channel so as to prevent it from flowing down to the extent of the capacity of their ditch. But on appeal the judgment was reversed, and this court, per MURRAY, C. J., said:

“The plaintiffs being the prior locators, it would follow that any interference with the waters of Dutch gulch would be an infraction of their rights. But the appropriation of the waters did not give them the exclusive use of the bed of the stream. We see no reason why it might not be used by others as a channel for conducting water, so long as it did not interfere with their rights. If the defendants were diverting the natural water of the stream, as well as that brought into it by themselves, then the plaintiff would have a just cause of complaint.”

In the case at the bar, the channel of the south fork of Jackson creek is used as a connecting link between the Amador county canal and the ditch of the defendants. The water from the canal is emptied into the fork with no intention of abandoning its use, but for the sole purpose of supplying the ditch. The principal difference between this case and that of *Hoffman v. Stone*, is the mingling of the water introduced by the defendants with the waters of the creek. In that case the channel of the stream was dry in certain seasons of the year, and at the time the suit was brought there was no natural water flowing in it. But it does not appear that this circumstance had any controlling influence upon the decision. The point settled in that case is this: that the prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. If the plaintiffs in the present case receive their full supply, as previous to the introduction of water by the defendants, they have no cause of complaint.

It does not necessarily follow that the water introduced by the defendants became subject to the use of the plaintiffs, because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners

of goods of equal value after their mixture—both are entitled to take their given quantity. Where there is a confusion of goods willfully made by one owner, without the consent of the other, so that it becomes impossible to distinguish what belongs to each, the common law gives the entire property to the injured party. “But this rule,” says Kent, is “carried no further than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. So, if the corn or flour mixed together *were of equal value, then the injured party takes his given quantity, and not the whole.*” 2 N. Y. 365; *Lupton v. White*, 15 Ves. 442.

The plaintiffs rely, with apparent confidence, upon the case of *Eddy v. Simpson*, 3 Cal. 249. In that case the plaintiffs were the prior appropriators of the water of Shady creek, having diverted the same by a dam across the stream. The defendants, by like means, obtained the water of Bloody run and Grizzly cañon, which they brought to a place known as Cherokee corral, where, after its use, it passed from their possession, and found its way, by natural channels and the natural level of the country, to Shady creek, at a point above the dam of the plaintiffs. And when the defendants undertook to retake from Shady creek a quantity of water equal to that which thus found its way into the channel, the court held their rights to the water were gone. “When the water of Grizzly cañon and Bloody run,” said the court, “left the possession of the defendants at Cherokee corral, all right to and interest in that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady creek, joining the waters there in the possession of the plaintiffs, and became a part of the body of water used and possessed by them.”

It is very evident that the court considered the fact that the water had passed from the possession of the defendants and found its way to Shady creek without their agency, as material circumstances of the case; in other words, it regarded the water as having been abandoned. This is the view taken by Mr. Chief Justice MURRAY, when he notices the objection that *Hoffman v. Stone* was within the rule of that case; for

the reason he assigns, as an answer to the objection, is the finding of the jury that the water was not abandoned by the defendants, and left to find its way by natural channels into Dutch gulch, but was turned in by the defendants, making the gulch a connecting link of their ditch.

There may be some difficulty, in cases like the present, in determining with exactness the quantity of water which parties are entitled to divert. Similar difficulty exists in the case of a mixture of wheat and corn—the quantity to be taken by each owner must be a matter of evidence. The courts do not, however, refuse the consideration of such subjects, because of the complicated and embarrassing character of the questions to which they give rise.

If exact justice can not be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party. The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

Cases involving questions of analogous character and equal difficulty are of frequent occurrence. The illustration given by the defendants' counsel is in point. A constructs a ditch, and appropriates a portion of the water of some stream for mining purposes; B subsequently constructs a ditch for a similar purpose, tapping the stream. A then enlarges his ditch, destroying the landmarks of its original capacity. A dispute then arises between A and B, as to whether A is not diverting more water through his enlarged ditch than he is entitled to by virtue of his first appropriation. Here the quantity of water to which A and B are respectively entitled becomes difficult of accurate adjustment; and if, instead of two, there be a greater number of ditches taking water from the same stream, questions respecting the conflicting rights of the parties become exceedingly complicated and embarrassing. The courts do not, however, as we have observed, refuse to entertain such questions, but endeavor to relieve them of their complication and embarrassment, and to mete out justice to all parties: *Priest v. Union Canal Company*, 6 Cal. 170,

and *White v. Todd's Valley Water Company*, 8 Cal. 443. In *Embrey v. Owen*, 4 Eng. L. & E. 470, Baron Alderson refers to a case in point. "There was a case," says the Baron, "of *Dakin v. Cornish*, tried before me at Leeds, in 1845, where water was taken from the river Ayr to work a steam engine. There was an artificial course from the river to a reservoir in the yard of a mill: the water was there mixed with other water obtained from the earth; the whole was then used for the steam engine; what remained was transferred into another tube and carried back to the river. And the question was whether this was an injury to some other mills lower down on the stream. We took much care about the case, and I left it to the jury to say if the same quantity of water continued to run in the river as if none of its water had ever entered the premises of the defendant, and if so, he was entitled to their verdict."

The first appropriator of the water of the stream passing through the public lands in this State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle with its waters other waters, and divert an equal quantity, as often as they choose. Whilst resting in the perfect enjoyment of their original rights, the first appropriators have no cause of complaint.

It follows that the court below erred in sustaining the demurrer to the new matter set up in the answer, and the judgment rendered thereon must be reversed and the cause remanded for further proceedings. Ordered accordingly.

Reversed.

ELLISON V. THE JACKSON WATER CO. ET AL.

(12 California, 542. Supreme Court, 1859.)

¹ **Ratification defined.** The term "ratified," when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another; it implies the relation of principal and agent.

Statute of Frauds—Promise to pay the debt of another. E. contracted to build an extension to a ditch upon which a mortgage existed. After work commenced, the holder of the mortgage instituted a foreclosure suit, whereupon E. refused to complete the extension. The holder of the mortgage then orally promised E. that he should be paid out of the receipts for the sale of water by the receiver, F., having originally agreed to be paid out of the proceeds of sales. Under this promise, E. completed the work: *Held*, that the contract was within the Statute of Frauds, as a promise to pay the debt of another.

Mechanics' lien—Supplementary statute falls with repeal of original act. The act of 1850 gave a mechanic's lien only upon buildings and wharves. The act of 1853 extended the act of 1850 so as to include ditches, etc. The act of 1855 repealed the act of 1850: *Held*, the repeal carried with it the supplementary act of 1853, which extended the provisions of the original act. Without the original act, there was no mode of enforcing the supplementary act. The latter was so dependent upon the former as to become utterly inoperative upon the repeal.

It is essential to the validity of such contract that it, or some note or memorandum thereof be in writing; that it express a consideration and be subscribed by the party to be charged; and the consideration of the original contract did *not* attach to the promise made to a third party.

Ditch, not a building or superstructure. A ditch is not a building, and in no sense can be denominated a superstructure under the Mechanics' Lien Law.

Flumes are parcel of the ditch. Flumes constructed at different points on the line of a ditch are mere connecting links over ravines and gulches, and do not change the general character of the work as an excavation; the whole must be regarded as a ditch.

Equity liens limited to vendor's liens. Equity raises no lien with respect to real estate or work upon real estate, except the lien of vendor for purchase money.

Appeal from the Fifth District, County of Amador.

This was an action brought to recover a judgment against the defendants in the sum of \$48,154.14 for services rendered

¹Approved, *Horn v. Jones*, 28 Cal. 203.

by plaintiff under a contract with the Jackson Water Company, for the construction of a ditch or canal, and also for the enforcement of a mechanic's lien upon the work.

On the twenty-second day of December, 1855, the plaintiff contracted, in writing, to and with the Jackson Water Company for the construction of a certain ditch or canal in continuation of one owned by the company. By the terms of the contract, the plaintiff was entitled—after the water was let into the ditch—to collect the water rents and retain one half thereof, which was to be applied in discharge of his debt against the company for the construction of the work. It is alleged by the plaintiff that he completed the ditch within the contract time. A breach of the contract is alleged by the plaintiff, on the part of the company, by depriving plaintiff of the right to collect the water rents of the ditch after he had collected only \$2,790.36, leaving unpaid for the work \$14,154.17. On the twenty-eighth of February, 1857, the plaintiff filed in the office of the county recorder where the ditch is located, certain papers claiming a lien upon the ditch and its appurtenances, in pursuance of the provisions of the Mechanics' and Laborers' Lien Law. In the notice of his intention to hold a lien upon the work, it is alleged that the ditch was constructed by plaintiff between the twenty-second of December, 1855, and the twenty-eighth of January, 1857.

Prior to the making of the contract between plaintiff and the company, the company had mortgaged the ditch to the defendant, Bayerque, to secure the payment of \$50,000. While plaintiff was in progress of the work, the mortgage debt fell due, and Bayerque instituted an action to foreclose the mortgage, and subsequently obtained a decree to that effect. Plaintiff alleges that in June, 1856, he gave Bayerque notice of his contract, etc. Here is the allegation of the complaint upon which the plaintiff seeks to hold Bayerque responsible for the payment of the construction of the ditch: "On the — day of June A. D. 1856, the defendant Bayerque, by himself and by his agents and attorneys, in consideration that plaintiff would not abandon his said work, and would not sue defendants at that time, adopted and ratified said contract, and agreed and stipulated that plaintiff should finish the work aforesaid contracted for, and that he be paid therefor by the

receiver, Thomas B. Wade, who, it is prayed, be made a party to this suit, and who was appointed said receiver in the suit for the foreclosure of the mortgage aforesaid between the defendant Bayerque and the Jackson Water Company; and, pursuant to said stipulation, the said receiver was directed to pay plaintiff for such work, according to said contract, as expressed in the terms thereof. And the said plaintiff avers that in consideration of said satisfaction of said contract, and believing that the defendant Moss was a party to such ratification—as plaintiff is informed and believes he was—the plaintiff proceeded to finish said work, and to complete the contract on his part; and plaintiff avers that it ever was the intention of defendants, Moss and Bayerque, that said contract should be carried out, and that said defendants, knowing the premises, agreed and stipulated that the same should be done.

On the seventh day of July, 1856, the ditch was sold under the decree of foreclosure, and Bayerque became the purchaser; and subsequently a sheriff's deed was duly executed and delivered to Bayerque.

Plaintiff had judgment in the court below for the amount of his demand and for the enforcement of his lien; Bayerque appealed therefrom to this court. No appeal was taken by the company.

LEVI PARSONS, for appellant.

SMITH & HARDY, for respondents.

FIELD, J., delivered the opinion of the court, TERRY, C. J., and BALDWIN, J., concurring.

It is unnecessary to pass in review the several objections raised on demurrer to the sufficiency of the complaint, and which are urged upon the attention of the court by the counsel of the appellant in a very elaborate brief, as the case can be disposed of upon its merits, independent of any question of pleading. The action is brought to recover a judgment against the Jackson Water Company and Bayerque, for work performed by the plaintiff in the construction of a ditch, under an alleged contract between him and the company made in December, 1855, and to obtain a decree enforcing a

lien claimed for the work upon the ditch thus constructed. Other parties were made defendants, but as no judgment passed against them they may be dismissed from the consideration of the case. The action, as against the company, rests upon the alleged contract, and as against Bayerque, upon what is inaptly termed by the plaintiff its "adoption and ratification" by him. The contract purports to have been made on the part of the company by only three of its five trustees, one of that number acting as attorney in fact for the third; but whether for this reason, or for any of the reasons assigned, it was without binding obligation, it is immaterial to inquire. The company have not appealed from the judgment, and can not, therefore, raise any question as to the legality of the contract, and the defense of Bayerque rests upon independent grounds. As against the company, the judgment for damages must be affirmed. It is only necessary, then, to determine the effect of the alleged "adoption and ratification" of Bayerque, and the validity of the lien asserted upon the ditch.

It can not in strictness be said that Bayerque "adopted and ratified" the contract between the plaintiff and the company. These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. No such relation existed between the company and Bayerque; the contract between it and Ellison was not made in Bayerque's name, or for his benefit, or upon any authority from him. What the plaintiff, however, intends by these terms is this: that Bayerque assumed the obligations of the company to Ellison upon the contract, or in other words, guaranteed the performance of the contract on the part of the company. In examining, then, the evidence contained in the record, we find nothing which establishes or even tends to establish any undertaking upon which Bayerque can be personally charged. The stipulation of the solicitor in the foreclosure suit only goes to the extent of authorizing the receiver to apply one half of the net proceeds of the extension of Ellison, in pursuance of his contract with the company. It does not purport to make any new contract, or to assume any obligation on the part of

Bayerque, even had the solicitor possessed any power to do so, of which there is no pretense. The certificate of the receiver, based upon such stipulation, and the supposed authority of his appointment, acknowledging and confirming the contract, was utterly inoperative to charge Bayerque. Neither the order nor stipulation gave the least power to the receiver to execute any such acknowledgment and confirmation. And besides, the receiver testifies that neither Bayerque nor any of his agents either knew of it or assented to it. The letter of Parsons does not even purport to have been written on behalf of Bayerque, or by his direction, or with his knowledge or approbation. It purports to have been written after a consultation with T. F. Moss, who is not a party to the suit. This Moss was, it would seem, a superintendent of the affairs of Bayerque in connection with the water ditch, but that his authority went beyond an ordinary superintendence nowhere appears. No evidence was given that he possessed any power to make an original substantive contract of the character claimed by the plaintiff. The record is bare of any attempt to establish the possession of such a power.

But aside from the view of the case upon the record, there is another fatal objection to the plaintiff's recovery. The undertaking which he seeks to establish against Bayerque falls within the Statute of Frauds. It is an undertaking to perform a contract which the Jackson Water Company had made, and which it was obligatory upon the company to perform; in other words, it was an undertaking to answer for the debt, default, or miscarriage of another. By the 12th section of our Statute of Frauds, which is substantially borrowed from the 4th section of the English statute of 29 Charles II, it is essential to the validity of any such contract that it, or some note or memorandum thereof, be in writing; that it express the consideration, and that it be subscribed by the party to be charged thereby. Neither of these particulars are found in the present case. There was no agreement in writing, or any note or memorandum of any agreement, and of course it would be idle in such case to speak of the want of an express consideration or the subscription of the party. The plaintiff was bound by his contract to perform certain work for the Jackson Water Company. A promise to Bayerque to per-

form this contract could furnish no consideration for a promise by him. The consideration of the original contract could not attach to the subsequent promise. On this point the authorities are numerous and without conflict: *Clay v. Walton*, 9 Cal. 328, is one, and the cases cited in the opinion fully sustain the position.

In *Puckett v. Bates*, 4 Ala. 390, the plaintiff had agreed with one Kelly to construct a house at the usual rate of charges. While the house was in the progress of erection, Kelly left the State, and went to Louisiana. The defendant then verbally promised to pay the plaintiff if he would proceed and complete the work; and it was held the promise was collateral and within the statute, and consequently without binding effect. The consideration resting wholly in the performance by the plaintiff of his antecedent contract, did not support the promise of the defendant.

The remaining question for determination relates to the validity of the lien asserted by the plaintiff upon the ditch. The act of 1850 gave mechanic's lien only upon buildings and wharves: Comp. Laws, 808. The act of 1853 extended the act of 1850, so as to include in its provisions bridges, ditches, flumes, or aqueducts constructed to create hydraulic power, or for mining purposes: Comp. Laws, 811. The act of 1855 repealed the act of 1850: Session Laws, 156, Sec. 12. The repeal carried with it the supplementary act of 1853, which extended the provisions of the original act. Without the original act, there was no mode of enforcing the supplementary act. The latter was so dependent upon the former as to become utterly inoperative upon the repeal. The act of 1855 gave a lien only upon buildings, wharves, and *other superstructures*. The same is the case with the statute of 1856. The work for which the plaintiff asserts a lien was performed between the twenty-second of December, 1855, and the first of February, 1857, and was therefore chiefly done after the act of 1856 took effect. It is immaterial, however, under which act the work was done, as both give a lien upon the same structures; neither gives a lien upon ditches in terms. The flumes constructed at different parts of the line can not change the general character of the work as an excavation; these flumes were mere connecting links of the ditch, over ravines and gulches. As a ditch, then, the general work must

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be regarded, and as such the statute gives no lien upon it for labor bestowed or materials furnished in its construction. The language of the statute is, "building, wharf, or other superstructure." A ditch, of course, is not a building, or a wharf, and in no sense can it be designated a superstructure.

The plaintiff can not, therefore, maintain the lien he asserts, under the statute; and outside of the statute there is no lien which can be enforced. Equity raises no lien in relation to real estate, except that of a vendor for the purchase money.

We purposely refrain from the expression of any opinion on the point whether Bayerque acquired any lien by his mortgage, or any right by his purchase, under the decree in the foreclosure case, upon the extension constructed by the plaintiff. The mortgage, it is true, does, in terms, purport to cover, not merely the works completed, or in progress at the time, but also lines of ditches and flumes for conducting or distributing water, which might be thereafter constructed by the company, as appurtenant to, or connected with, the works. This broad language can not, however, we apprehend, give a lien upon ditches, for the construction of which no steps had been taken, by a survey and location of their lines, and which rested merely in contemplation. Some specific right of way, capable of identification from a previous survey or location, would seem to be necessary to constitute such property as is capable of mortgage or transfer, so as to pass subsequently constructed works thereon. In the present case it does not appear from the record, whether, at the date of the mortgage, any survey or location had been made of the line of the extension; and without it, the property was not covered by the mortgage, and did not pass by the master's deed. It would still remain subject to execution on the plaintiff's judgment, as the property of the company. The effect, however, of the mortgage in creating a lien, can not be determined upon the evidence in the present case.

It follows, from the views we have taken, that the judgment for damages against the Jackson Water Company must be affirmed, and that the judgment for damages against Bayerque, and the decree adjudging a lien upon the works constructed by the plaintiff must be reversed, and the cause remanded for further proceedings.

Ordered accordingly.

¹MYERS V. SOUTH FEATHER RIVER WATER CO.

(14 California, 263. Supreme Court, 1859.)

Contract to pay in water. Defendant employed plaintiff to build a ditch at the rate of \$3 per rod, one third payable in money at the completion of each mile and two thirds by the delivery of water, the company having the right to pay all cash instead of partly in water if they preferred: *Held*, that if they elected to pay such two thirds in cash it did not become due in installments, like the one third, but upon the completion of the ditch.

Idem. The payments in water could not be claimed before the ditch was completed, and the cash can not be required sooner.

Payment to assignee. The holder of a contract assigned generally to him as collateral security for a debt has the right to receive the payments to be made on the same; and the payer is not bound to limit his payment to the amount secured; any payment beyond such amount would become a debt from the assignee to the assignor.

Assignee may elect. The assignee of a contract may exercise a right of election or option therein contained.

Appeal from the Fifteenth District.

The facts can be gathered from the opinion in 10 Cal. 580, and the opinion on this appeal. The matters set up in the answer of defendants, as set forth in 10 Cal. 581, 582, were proven. On the last trial it appeared that at the settlement between plaintiff and defendant, April 12th, 1856, there was due plaintiff eight thousand one hundred and twenty-five dollars and fifty-four cents. Lumbert & Co. having demanded this sum Nov. 1st, 1856, and defendant then electing to pay in cash, instead of water, paid L. & Co. five thousand six hundred and thirty-two dollars and fifty-nine cents, on account of the contract. This was a little more than was due L. & Co. from plaintiff. After deducting this sum together with the judgment against plaintiff, paid by defendant, from the eight thousand one hundred and twenty-five dollars and fifty-four cents, the court below found a balance due plaintiff of about one thousand one hundred dollars, allowing interest only from Nov. 1st, 1856, the time of demand made by Lumbert & Co. But, as defendants had, at the institution of the suit, tendered a larger sum, which plaintiff refused, they recovered costs. Plaintiff appeals.

¹S. C. 2 M. R. 541.

ROBINSON, BEATTY & HEACOCK, for appellant.

C. COLE, for respondent.

BALDWIN, J., delivered the opinion of the Court, COPE, J. concurring.

This case, involving the construction of a certain contract, was here before. The contract is fully set out, and will be found in 10 Cal. 580. After the return of the cause it was tried again, and is brought up by the plaintiff, on appeal, from the judgment of the district judge, who tried the case without a jury. The contract was to dig a ditch by plaintiff for defendant, and the question arises as to the construction of the following sections of the contract: "For and in consideration of which, the parties of the second part agree to pay to the party of the first part the sum of three dollars per rod for each and every rod of the above mentioned excavation, made according to the terms of this contract, at the time, place and manner, hereinafter mentioned, viz.: they shall pay at the office of the company, at Forbestown, thirty-three and a third per cent. on the completion of each mile, in cash, of its value, estimated at three dollars per rod; the remaining sixty-six and two thirds per cent. or two dollars per rod, shall be paid in water, at the rate of twenty-five cents per inch, delivered through an orifice under six inches of pressure anywhere along, and at, the main ditch.

"Sec. 8. It is further agreed, between the parties contracting, that the parties of the second part shall reserve the right to pay the value of the excavation or three dollars per rod in cash, and also the right to appoint such agent, or agents, to manage the sale of water and other matters of the company as they, the parties of the second part, may deem best for the interest they represent.

"Sec. 9. The parties of the second part agree to pay to the party of the first part the actual first cost of all the flumes; the party of the first part may construct upon the line of the main ditch, in the proportions of cash and water as before specified, for the excavation, viz., one third in cash, and two thirds in water; or, at the option of the parties of the second part, the whole amount in cash—the water to be estimated,

measured and delivered, as before specified for the excavation, under a pressure of six inches.

“Sec. 11. The parties of the second part agree to sell to the party of the first part all the water the party of the first part may desire, that may run in said ditch, at the rate of twenty-five cents per square inch, and measured as before specified, under a pressure of six inches, until the party of the first part is fully paid, according to the terms of this contract for the work herein contracted for; and the party of the first part hereby agrees and binds himself to sell no water to any person or persons for a less amount than fifty cents per square inch, measured as before specified under a pressure of six inches.

“Sec. 12. The parties of the second part agree to pay to the party of the first part the proceeds of all water sold by the agent or agents of the company out of said ditch, until the party of the first part shall be fully paid for the construction of said ditch according to the terms of this contract; all branch ditches dug shall be the property of the South Feather Water Co. upon the full payment of the terms specified herein, without further cost to the company.

“Sec. 15. The party of the first part agrees to pay twenty-five cents per square inch for all or any first sales of water anywhere along the line of said ditch, or between its terminus and Feather river, until the terms of this contract are fulfilled.”

We construe this agreement, taken together, to mean this: That the company should pay three dollars per rod—one third of it in money—on the completion of each mile, at the office of the company, the other two thirds to be paid in water, at the rate of twenty-five cents per square inch, delivered through an orifice under six inches of pressure, anywhere along, and at, the main ditch. But this obligation to pay in water, as by the 7th Section, was not unqualified. The 8th Section gives the defendant the option to pay all in cash or money. But it does not follow that the two thirds, if elected to be paid in money, were to be paid as the other third, in money, on the completion of each mile. The first provision is for a payment in water; this provision is changed by the 8th Section into a provision for a payment in cash, at the election of the com-

pany. The payment in water would have been as the water was demanded anywhere along the ditch, and would not, of course, be due until the whole ditch was completed; and when this term was changed by an alteration in the medium of payment, it is not to be considered as altering any other of the terms of the contract except the medium. It nowhere appears that the contract was considered more beneficial to the plaintiff with this term for the payment in water, than a provision for payment in money. The remainder of the 8th Section, reserving the right of the company to appoint such agent or agents to manage the sale of water and other matters of the company, as they shall deem best, etc., seems to support this view; for if the plaintiff was to be entitled at once, on the completion of each mile, to the sum in cash, there was no use for this reservation, nor would there be if payment was to be made in specie in water. The words seem to imply that the plaintiff was interested in the sales and in the manner of selling the water. The 12th Section, too, seems to look the same way—the parties of the second part agreeing to pay to the party of the first part the proceeds of all water sold by the agents of the company out of the ditch, until he shall be paid for the construction of it according to the terms of the contract. We think the whole contract results in this—that the company was to pay one third in cash, on completion of each mile, etc.; that for the balance, they might pay after the completion of the ditch in money or water as they chose; if payment was made in water, the plaintiff might select the water anywhere along, and at, the main ditch; if in cash, or money, payment was to be made out of the proceeds of the sale of water. And by the 11th Section, there was given the plaintiff a right to take water, if payment was not otherwise made, at twenty-five cents per inch.

But it is not, perhaps, necessary to give a definite construction to this contract—which is awkwardly and obscurely drawn—for the contract, before the completion of this work, was assigned to Lumbert & Co. as security for a debt due them by plaintiff. We passed upon the effect of this assignment in this case at a former term. It transferred, as we then held, the whole benefit of the contract to the assignees. They demanded, on the 1st November, 1856, payment of this money

—or, at least, so much as was coming to them from Myers. The defendant elected to pay, and did pay, in money. The payment to Lumbert & Co. was in money, on a statement, as of so much due in money. Even if Lumbert & Co. had no right to receive this money, but only water, as the plaintiff contends, yet this payment would bind the plaintiff, for Lumbert & Co. were acting ostensibly for him, or by his authority. If he denied the authority, then the payment would not discharge the debt of Lumbert & Co., in which case the assignment would remain in full force, and the plaintiff would, under our previous decisions, have no right of action. Affirming the arrangement between Lumbert & Co. in part, the plaintiff must give full effect to it, and in doing this, he confirms the settlement as the liquidation and arrangement of a money demand.

If we concede that the election was with the plaintiff to take his pay in money or water, the argument of the learned judge below is conclusive; for, by the assignment, the right of election passed to Lumbert & Co. and their action settled it as a money demand. And if the right of election were with the company, the result, of course, is the same.

It seems that the company paid Lumbert & Co. one hundred and sixty-two dollars more than was due them, as the debt coming from Myers, which sum is deducted from the credit given to the company on the indebtedness on account of this contract. But we do not see how this deduction was properly made; for the assignment to Lumbert & Co. was general, and the authority given to the assignee, general, to control and receive money, etc., on this contract between Myers and the company. The company were not bound to examine the state of account between Lumbert & Co. and Myers, and pay at its peril only such sum as was rightfully due. The payment for this whole amount was good under this general power, Lumbert & Co. being the trustees of Myers for any excess of money received over the amount of their claim.

But according to our view of the case, independently of this fact, we do not see any error in the judgment of the court in refusing to allow interest, as no showing was made that the receipts of the sales of the water, to the time of the

settlement with Lumbert & Co. or with Myers, before (if he had any authority to liquidate the sum due), was sufficient to pay the debt. If there was, this sum improperly deducted—this being a matter found by the court on uncontradicted evidence—would restrain us from interfering with the judgment below, in order to change the judgment for costs.

One or two other errors are assigned, but in the view we have taken of the question they become unimportant.

Judgment affirmed.

KIDD ET AL. V. LAIRD ET AL.

(15 California, 162. Supreme Court, 1860.)

Statement on motion for new trial; how authenticated. No mode of authentication of a statement on motion for a new trial is pointed out by the statutes of California, but any satisfactory evidence in the record that the statement has been examined and approved by the judge, is sufficient.

¹ **Rights to running water.** Running water, so long as it continues to flow in its natural course, can not be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property, but this right carries with it no specific property in the water itself.

² **Property or right.** The owner of a ditch has exclusive and absolute power of control over and right of enjoyment in the water running in his ditch, whether the water is or is not, in a strict legal sense, his private property.

³ **Right to change point of diversion.** A party entitled to divert a given quantity of water from a stream, may exercise the right at any point on the stream and may change the point of diversion at pleasure, provided he does not injuriously affect the rights of others.

Effectuality of appropriation. The right secured by priority of appropriation, though not founded upon a legal title, should be regarded as perfect as if secured by prescription or express grant; the exercise of the right does not depend on the source of the right.

Distinct defenses--Verdict. If a general verdict is found for the defendants in a suit in which there are several distinct defenses, the verdict will be allowed to stand if it be right as to one, though wrong as to all the others.

¹ *Trippe v. Overacker*, 1 West C. R. 352; 7 Colo.—.

² *Park's Canal Co. v. Hoyt*, 57 Cal. 44.

³ *Laris v. Gale*, 4 M. R. 604; explained and affirmed, *Butte Co. v. Morgan*, 4 M. R. 583.

Conclusiveness of verdict. A verdict found on any fact or title, distinctly put in issue, is conclusive in another action between the same parties or their privies in respect of the same fact or title. It is not sufficient that the particular fact or title is put in issue. It must be tried by the jury, and constitute the basis and foundation of the verdict.

¹ **General verdict.** A general verdict is limited in its effect to such issues as necessarily controlled the action of the jury.

Appeal from the Fourteenth District.

There was a general verdict "for defendants." The facts as claimed by *appellants* were as follows:

By the evidence contained in the record we think the following facts are conclusively established, viz.: 1st. The Deer Creek and Coyote ditches have the advantage of priority over all others. This is admitted by the answer. 2d. The Deer Creek Mining Company's ditch was constructed before the defendant's Gold Flat ditch. 3d. The Deer Creek Mining Company's ditch was constructed before Laird's new ditch. 4th. The Gold Flat ditch, with its original form and size, was constructed before the Snow Mountain ditch. 5th. The Snow Mountain ditch has priority over Laird's new ditch, and over the enlargements of the Gold Flat ditch. 6th. The enlargements of the Coyote and Deer Creek Mining Company's ditches were all made before the construction of Laird's new ditch, and before the enlargement of the Gold Flat ditch. The Deer Creek ditch was never enlarged.

And here it may be as well to give the dates of the construction of the several ditches mentioned. The Deer Creek and Coyote ditches were both constructed in the fall of A. D. 1850. The Deer Creek Mining Company's ditch, in the spring of A. D. 1851. The Gold Flat ditch was commenced about the last of 1851, or first part of 1852, and completed with its original dimensions about June, A. D. 1852. The Snow Mountain ditch was located and its construction commenced on the seventh day of April, A. D. 1853; and was completed so as to convey water during that year. It was finally and fully completed some time in the spring of 1854. The Laird's new ditch was located in June or July, A. D. 1855, and completed so as to divert water, by the thirty-first of December

¹ *Allen v. Tritch*, 5 Colo. 222.

of the same year. Upon this last proposition alone, we presume, will there be any dispute.

Lastly, the enlargements of the Deer Creek Mining Company's ditch were made in the year 1852, and at the lower end some enlargements were made in the years 1853 and 1854. Those of the Coyote ditch were in 1854. The Deer Creek ditch was never enlarged. The enlargements of defendants' Gold Flat ditch were made in the year 1856.

Facts as claimed by *respondents*.

1. Kidd and others were the owners of two ditches called the Deer Creek ditch and the Coyote ditch, constructed in 1850, to take each one hundred inches (miner's measure) of water from the stream known as Deer creek, in Nevada county, to the mines adjacent, for mining purposes.

2. In the year 1851, Laird & Chambers constructed a ditch called the Gold Flat ditch, lower down on the same stream, of sufficient size to divert and convey away about five hundred inches of water (miner's measure) to the adjacent mines for mining purposes.

3. Later in the year 1851, the Deer Creek Mining Company's ditch, belonging to Kidd and others, was constructed of capacity to convey about one hundred inches of water (miner's measure) from the same stream.

4. Later in the year 1851, the Coyote ditch above named was enlarged from about one hundred inches to about three hundred inches capacity.

5. Still later in point of time, the Deer Creek Mining Company's ditch, belonging to Kidd and others, was enlarged from its original capacity of about one hundred inches to about four hundred inches—this ditch being above or higher up the stream than those above named.

6. In the year 1853, the ditch called the Little Snow Mountain ditch was constructed from the main north tributary of Deer creek, belonging to Kidd & Co., above all the ditches, of capacity about one hundred inches.

7. In the year 1853, Shannon & Co. constructed a ditch from the same stream at a point between the Coyote ditch and the Deer Creek Mining Company's ditch, of capacity about four hundred inches or five hundred inches, and after passing into the hands of Choquette & Co., was sold by them to Laird

& Chambers, who in 1854 extended the same on to the mines in the vicinity of Nevada City; this being called Laird's new ditch.

8. In 1854, Kidd and others constructed the Big Snow Mountain ditch, at the forks of the two main tributaries of Deer creek, one mile or more below the Little Snow Mountain ditch, and two miles above the Deer Creek Mining Company's ditch, of capacity about eight hundred inches. The two Snow Mountain ditches, after running the distance of ten miles apart, connect near a reservoir at their lower terminus.

9. In consequence of the partial exhaustion of the mines at the terminus of the Deer Creek ditch, the lowest of the ditches of Kidd and others, and in consequence of the enlargement of the Coyote ditch from one hundred to three hundred inches, the two running parallel, and within a few feet of each other, Kidd and others discontinued the use of the Deer Creek ditch in 1854.

10. During the time mentioned in the complaint, Kidd and others diverted, by means of their Big Snow Mountain ditch and their Deer Creek Mining Company's ditch, as enlarged, 1,200 inches of water, whenever the supply in the stream was equal—these ditches being higher up than either one of Laird and others—and thus deprived Laird and others, for the same period, of their quantum, whenever the supply in the stream fell below 1,200 inches.

11. For much of the period complained of, Kidd and others "run waste" large quantities of water; or in other words, to prevent Laird & Chambers from getting any portion, diverted it at points above on the stream, and run it through their ditches, and without using or selling it, or permitting any one to use it, turned it back into the natural channel below, and around the mines and works of Laird & Chambers.

12. While Kidd and others were running their Little Snow Mountain ditch and Big Snow Mountain ditch and Deer Creek Mining Company's ditch full, the quantity in these three ditches, the three highest on the creek, being about 1,300 inches, or 1,000 inches more than they were entitled to, Laird & Chambers were running one hundred and fifty to three hundred and fifty inches through their ditch, called Laird's new ditch, a part of which time none or very little water was left

in Deer creek, to flow below to the Coyote ditch of Kidd and others, and their Deer Creek ditch, and none left to flow to Laird's Gold Flat ditch.

For the deprivation of water in the two ditches called Coyote and Dear Creek ditches, caused as above appearing, Kidd and others brought this suit to recover \$10,000 damages.

The names and situations of the various ditches in regard to which evidence was admitted, are: 1st. The Deer Creek and Coyote ditches, which tap the creek within about one half mile of each other. 2d. Laird's new ditch—the one complained of by the plaintiffs—which is above the Deer Creek and Coyote ditches. 3d. Laird's Gold Flat ditch, which intersects with Deer Creek some distance below the Coyote and Dear Creek ditches, and at a point three and a half miles below the head of Laird's new ditch. 4th. The Deer Creek Mining Company's ditch, above the head of Laird's new ditch, and on the south side of Deer creek; all the other ditches, except the Gold Flat ditch, are on the north side. 5th. The Snow Mountain ditch, which taps the stream above all the others.

Starting from the mouth of Deer creek, and traveling up the stream, a person would arrive at the head of the various ditches in the order following: Laird's Gold Flat ditch, Deer Creek ditch, Coyote ditch, Laird's new ditch, the Deer Creek Mining Company's ditch, the Snow Mountain ditch. Of these six, four belong to the plaintiffs, viz.: The Deer Creek, the Coyote, the Deer Creek Mining Company's, and the Snow Mountain; and two, the Gold Flat, and Laird's new ditch, to the defendants.

The contest in the case was upon the following points: 1st. As between the Deer Creek and Coyote ditches on the one hand, and Laird's new ditch on the other. 2d. Between the enlargements (if any were made) of the Deer Creek and Coyote ditches and Laird's new ditch. 3d. Between Laird's new ditch and the Deer Creek Mining Company's ditch, with its enlargements. 4th. Between Laird's new ditch and the Snow Mountain ditch.

The court below admitted testimony in regard to the Gold Flat ditch, which added the following complications and points to the case, viz.: 5th. As between the Deer Creek and

Coyote ditches and their enlargement, and the Gold Flat ditch and its enlargements. 6th. Between the Deer Creek Mining Company's ditch and its enlargements, and the Gold Flat ditch and its enlargements. 7th. Between the Snow Mountain ditch and the Gold Flat ditch. 8th. Between the Snow Mountain ditch and the enlargements of the Gold Flat ditch. 9th. Between the enlargements of the Coyote and Deer Creek Mining Company's ditch, and the enlargement of the Gold Flat ditch.

The verdict was: "We the jury in the above entitled cause find for defendants."

The order overruling the motion for new trial states that "the motion would be granted, if the effect of the verdict of the jury and judgment thereon will be to limit the quantity of water to which plaintiffs are entitled to the priority, to one hundred inches in each of their two ditches, to wit: the Coyote and Deer Creek ditches; for the testimony of defendants' witnesses, to say nothing of plaintiffs', all showed that each of the ditches above named was of sufficient capacity to run much over one hundred inches of water before defendants had constructed any ditches. But I infer the jury must have concluded that plaintiffs themselves had diverted the water to which they were entitled for the Deer Creek and Coyote ditches, by means of their other ditches above, and that these facts could be shown, should it ever hereafter be necessary to determine what was really in issue upon the former trial."

There was much evidence as to the size and capacity and the enlargements of all the ditches.

Defendants had judgment. Plaintiffs appeal.

McCONNELL & NILES, for appellants.

MEREDITH & HAWLEY, for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J., and BALDWIN, J., concurring.

The objection to the authentication of the statement on the motion for a new trial is not well taken. The statement is signed by the judge, and the minutes of the court show that

it was used on the hearing of the motion. No mode of authentication is pointed out by the statute, and any satisfactory evidence that the statement has been examined and approved by the judge is sufficient. This evidence must, of course, appear in the record, in some legitimate and proper form.

This is an action to recover damages for the diversion of water from Deer creek in Nevada county. The complaint sets forth that the plaintiffs are the owners of two certain ditches, by means of which they appropriated the water of that stream for mining purposes, and that the defendants wrongfully diverted such water, and deprived the plaintiffs of the use of the same, to their damage, etc. The answer admits the existence and ownership of these ditches, but denies that the plaintiffs appropriated the whole of the water of the stream, and denies that the defendants diverted any portion of the water to which the plaintiffs were entitled. The answer states, among other things, that the defendants are also the owners of certain ditches by means of which they appropriated the surplus water of the stream, over and above the quantity appropriated by the plaintiffs; that neither of the plaintiffs' ditches, as originally constructed, possessed the capacity to convey more than one hundred inches of water; and that since the appropriation by the defendants, these ditches have been greatly enlarged, and their capacity materially increased. It states, further, that the plaintiffs are the owners of certain other ditches tapping the stream at different points above the ditches mentioned in the complaint; and that at the time during which it is averred that the defendants wrongfully diverted the water, the plaintiffs were themselves diverting, through such other ditches, the entire quantity to which they were in any manner entitled. The answer contains several other defenses, but a particular reference to them is unnecessary for the purposes of this opinion.

The ditches from which it is claimed that water has been improperly diverted by the defendants are situated on the north side of Deer creek; one of them is called the Deer Creek ditch, and the other the Coyote ditch. The other ditches belonging to the plaintiffs are: 1st. The Deer Creek Mining Co. ditch, on the south side of the stream; 2d. The

Big Snow Mountain ditch, on the north side of the stream; and 3d. The Little Snow Mountain ditch, on the same side. These ditches tap the stream in the order above enumerated. The defendants' ditches are: 1st. The ditch known as Laird's Gold Flat ditch, situated on the south side of the stream, below all the ditches of the plaintiffs; and 2d. Laird's new ditch, on the north side of the stream, between the plaintiffs' Coyote ditch and their Big Snow Mountain ditch. The diversion of water through the latter ditch of the defendants constitutes the cause of action stated in the complaint.

The learned judge before whom the case was tried in the court below, in overruling the motion for a new trial, placed his decision upon the ground that the jury were authorized to infer from the evidence that the plaintiffs themselves had diverted the water to which they were entitled from their Deer Creek and Coyote ditches, by means of their other ditches above. The counsel for the appellants, in referring to this decision and the reason for it, say: "We differ materially and radically from the learned judge upon the character of the evidence in regard to damages; but the difference arises from the different points of view from which we look at the question. If the evidence respecting the Gold Flat ditch was, as held by his Honor, properly admitted, then, perhaps, some portions of the testimony respecting damages might be considered as conflicting; but if, as we contend, that evidence ought to have been excluded as improper, there is no conflict whatever. No one, not even the respondents, will pretend to say that we did not establish, by uncontradicted proof, that Laird's new ditch had frequently taken water from the creek when we were in actual need of the same water to fill our Deer Creek and Coyote ditches. Their answer to this proof consists, not of a denial of its truth, but of an attempt to show that we had diverted all the water to which we were entitled, by means of the Deer Creek Mining Co.'s and the Snow Mountain ditches. But both of the last-named ditches are, as we have very conclusively shown, prior in date of construction to Laird's new ditch, and the Deer Creek Mining Co.'s ditch has priority over the Gold Flat ditch, so that, after all, the respondents' own argument necessarily has the effect to limit the controversy as respects damages to the Snow Moun-

tain and Gold Flat ditches. Of course, then, if our views in regard to the Gold Flat ditch are correct, this hypothesis of the defendants falls to the ground, and the single question remains to be determined, whether the defendants' new ditch did or did not, within the period charged in the complaint, divert water to which the plaintiffs' Deer Creek and Coyote ditches had the preference; and on this point, leaving the Gold Flat ditch out of sight, there is no dispute or controversy." This quotation from the brief of appellants' counsel presents fully and fairly their view of the case, and avoids, to a great extent, the necessity for a critical examination and elaborate review of the evidence. Their position is simply this: that all the evidence in regard to the Gold Flat ditch was improperly admitted, and that rejecting this evidence, there was no conflict of testimony upon the question of damages. If the evidence was admissible, it is, upon their own showing, sufficient to support the verdict.

The object of this evidence was to show that the defendants were entitled to a certain quantity of water for their Gold Flat ditch, and that they diverted this quantity through their new ditch instead of the other, which it was claimed they had the legal right to do. The evidence having been admitted, the court instructed the jury, in effect, that a person entitled to divert a given quantity of the water of a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others are not injuriously affected by the change. The following instruction, asked by the plaintiffs, was refused: "If the jury believe from the evidence that the dam of the defendants' Gold Flat ditch is below the dams of the Deer Creek and Coyote ditches, and that the dam of the defendants' new ditch is above the dams of the Deer Creek and Coyote ditches, then, even if the defendants had a prior right to any of the waters of Deer creek for their Gold Flat ditch, they could not substitute their new ditch for their Gold Flat ditch, and use the water to which, as owners of the Gold Flat ditch, they were entitled, in such new ditch." As the instruction given by the court embodies the principle upon which this evidence was admitted, and upon which the instruction asked by the plaintiffs was refused, a determination of the correctness of that instruction disposes of the whole question.

This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not and can not be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared, in several cases, that this right carries with it no specific property in the water itself. We are not called upon to determine the character of the property which the owner of a ditch has in the water actually diverted by and flowing in his ditch. With reference to such water, his power of control and right of enjoyment are exclusive and absolute, and it is a matter of little practical importance whether, in a strict legal sense, it be or be not private property. In regard to the water of the stream, his rights, like those of a riparian owner, are strictly *usufructuary*, and the rules of law by which they are governed are perfectly well settled.

It is contended that the principle embodied in the instruction is in direct conflict with this doctrine, and that it can only be maintained upon the theory of a private ownership in the water itself. This position is clearly untenable. If the government, which in this instance is the riparian proprietor, had granted to the defendants the right to divert from the creek a given quantity of water, without restriction as to the place of diversion, it is clear that the right could be exercised at any point on the stream, though the effect of the grant would not have been to convey any property in the *corpus* of the water, for no such property is vested in the government. It is obviously immaterial whether the right was acquired under an express grant, or by prescription, or rests in the parol license, or the presumed consent of the proprietor. The difference relates to the mode of determining the existence and extent of the right, and not to the manner of its exercise and enjoyment. Angell, in his work on Water Courses, in treating of easements acquired by prescription, says: "The extent of the presumed right is determined by the user, on which is founded the presumed grant, the right granted being commensurate with the right enjoyed." (Ang. on Water Courses, Sec. 224.) But he also says that "although the extent of the right is to be measured and regulated by the enjoyment upon which the right is founded, the

party is yet allowed freedom in the manner of exercising it." (Id., Sec. 226.) "In this country, the doctrine is well settled," says the same author, "that where a right has been acquired by virtue of twenty years enjoyment to use a certain quantity of water, a change in the mode and objects of use is justifiable; and here, as in England, the only restriction is, that the alterations made from time to time shall not be injurious to those whose interests are involved." (Id., Sec. 227.) "All that the law requires is, that the mode or manner of using the water should not have been materially varied, to the prejudice of others." (Per Chancellor WALWORTH, in *Belknap v. Trimble*, 3 Paige Ch. 605.) The case of *Whittier v. Cocheco Manf. Co.*, 9 N. H. 454, is directly in point. It was there decided that a change may be made in the place, as well as in the mode and objects of the use, if the quantity of water used is not increased, and the change is not to the prejudice of others. It was held that a party who had acquired by prescription a right to take a certain quantity of water at a particular dam, might open his gates and draw that quantity, without using it there, in order to use it at other works below on the same stream. These authorities show conclusively that in all cases the effect of the change upon the rights of others is the controlling consideration, and that in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper. It follows that in this case the law was correctly given by the court, unless the rights of the parties are distinguishable from the class of rights to which these authorities refer, and the same rules and principles are not applicable. Upon this subject it is only necessary to consider that none of the rights involved in this controversy are founded upon a legal title, and that the safety and security of the parties require that the rights of each, as fixed by the priority and extent of their respective appropriations, should be regarded as perfect and absolute as if they had been acquired by prescription, or were held under an express grant from the riparian owner. This is the only reasonable rule which can be adopted in cases of this character; and it is the more reasonable, as it enables us to test the rights of parties by certain well settled principles of law, instead of relying upon our own unaided reason and judgment.

The next most important question in the case, and the only additional one which we propose to consider, relates to the effect of the verdict. It is contended that under the issues presented by the pleadings, the effect of the verdict is to establish the original capacity of the plaintiffs' Deer Creek and Coyote ditches at one hundred inches of water, and to limit the right of diversion through each of those ditches to that quantity. The evidence shows very clearly that their capacity was much greater, and if the effect of the verdict were as contended, it would be a great hardship to the plaintiffs to permit it to stand. But we think that such is not its legal effect, and even if it were, we do not see upon what principle we could disturb it. There were several separate and distinct defenses, each of which was sufficient to defeat the action. These defenses were submitted to the jury, together with the evidence in support of each, and it is impossible for us to determine upon what particular issues the verdict was found. Nor is it necessary that we should do so, for if it be right as to one, it can not be set aside, though wrong, as to all the others. "If there be two issues," says WASHINGTON, J., in *Lonsdale v. Brown*, 4 Wash. C. C. 148, "or issues on two counts, and the verdict be not contrary to evidence as to one of them, the court will not grant a new trial, though it be contrary to evidence as to the other; for, since the verdict is right in part, the court will not set it aside." (See also Grah. & Wat. on New Trials, 1339; 1 Barnes, 9, 317, 333; and 9 Bac. Ab. 600, Bouv. ed.)

We think this verdict can not in any event be disturbed, but we are of opinion that its legal effect is different from that attributed to it by the plaintiffs. The rule is, that a verdict found on any fact or title distinctly put in issue, is conclusive in another action between the same parties or their privies, in respect of the same fact or title: 2 Wheat. Selw. 1356; *Outram v. Morewood*, 3 East, 346; *Vooyht v. Winch*, 3 Barn. & Ald. 662. It is not sufficient that the particular fact or title is put in issue. It must be tried by the jury, and constitute the basis and foundation of the verdict. It must be relevant and material, and unless specially found must have been necessarily passed upon by the jury: *Burt v. Sternburgh*, 4 Cow. 559; *Gardner v. Buckbee*, 3 Id. 120. There is noth-

ing in this case showing that the verdict turned upon the question of the capacity of the plaintiffs' ditches, and it is a reasonable inference from the evidence, that the issue upon that point was entirely disregarded. It was not necessarily considered, and as the verdict is general, its effect is limited to such issues as necessarily controlled the action of the jury. Upon the question of the capacity of these ditches the jury could have found for the plaintiffs, and still justly and properly concluded that they were not entitled to damages. To hold that upon such a question the verdict is conclusive of the rights of the parties, would, we think, be a plain perversion of the law.

The view we have taken of the case renders it unnecessary to consider any other questions discussed in the briefs of counsel.

Judgment affirmed.

BUTTE T. M. COMPANY V. MORGAN. ET AL.

(19 California, 609. Supreme Court, 1862.)

- ¹ **Change of ditch head.** A person who has appropriated a given quantity of water from a stream has not an absolute and unqualified right to change the point of diversion, but he may change it at pleasure provided the rights of intervening locators be not injuriously affected.
- ² **Illegal diversion of water prevented by use of force.** The plaintiff attempted to divert water from a stream at a point above defendants' dam and the defendants ejected the plaintiff from the premises: *Held*, that as the diversion would have been illegal, the defendants adopted a legitimate mode of averting the injury.

Appeal from the Fifteenth District.

The findings of the court below, with the conclusions reached, are as follows:

"In the spring of 1853, Morrow & Co. erected a dam upon 'Saw Mill ravine,' and dug a ditch, by which they appropriated and used thirty inches of the water of the ravine. The

¹ *Kidd v. Laird*, 4 M. R. 571; *Sieber v. Frink*, 7 Colo.—.

² *Stiles v. Laird*, 5 Cal. 120; *Post* NUISANCE.

right of thirty inches has been transferred to Gregory & Co., and the point of tapping the stream has been changed one mile further up, and near the source. It is now known as the Gregory ditch. In May, 1853, (after the water of the Gregory ditch had been appropriated) Lehman & Co. posted notices on Saw Mill ravine, claiming all the surplus water of the ravine, and in November and December of that year erected their dam some distance below the dam of Gregory & Co., and in January, 1854, commenced the use of water from the ravine. Their ditch, as dug at that time, was of the capacity of one hundred and fifty inches; but the flume along the line of the ditch was only sixty inches capacity, and there is no showing that the capacity of the flume has ever been increased. This right has been transferred to plaintiffs, and is known as the Butte Table Mountain ditch.

"In November, 1855, Lewis & Co. erected a dam upon the ravine, about six hundred yards above the dam of the Butte Table Mountain ditch, claiming the surplus water of the ravine — whatever the same might be — for the purpose of working mining claims owned by themselves and others along the banks of the Saw Mill ravine, and have used the waters of the ravine since that time for the purpose appropriated, discharging it back into the ravine above the dam of the Butte Table Mountain company. This right has been transferred to the defendants. The defendants have, since the first diversion of the water in the fall of 1855, changed the course of their diversion from the east to the west bank of the ravine, tapping the stream at about the same point, and returning the water back to the ravine still above the head of the Butte Table Mountain Company dam.

"In the fall of 1858, the plaintiffs erected a dam on the ravine some distance above the head of their old dam, and below where defendants discharged the water from their ditch back into the ravine, and diverted about eight or ten inches of water by means of the dam and through a tunnel claim of plaintiffs. This water was used as a motive power in propelling some machinery for the ventilation of plaintiff's tunnel.

"The water used by defendants, with the gravel and sediment from their mining claims, is turned into the ravine above this small dam of plaintiffs. The water diverted by

the Gregory ditch, after being used in mining, was discharged into Campbell's ravine, and found its way, with the gravel and sediment carried with it, back into Saw Mill ravine, below the dam of defendants, but above both the dams of plaintiffs.

"The gravel and sediment coming down Saw Mill ravine sometimes obstructed the upper dam and trough of plaintiffs, so that sufficient water could not pass through to propel the machinery for the ventilation of their tunnel. There is no evidence to show any obstruction to the dam or ditch of plaintiffs further down the ravine, located in 1853.

"In November, 1859, the plaintiffs selected a point upon Saw Mill ravine, some distance above the dam of defendants for the purpose of erecting a new dam, by which to divert the water at that point through a ditch intended to be dug by plaintiffs to convey the water to certain claims on the east bank of the ravine. This contemplated ditch would have diverted the water entirely from the defendants' dam and ditch. From this point on the ravine, selected for their dam and reservoir, the plaintiffs were ousted by the defendants, and defendants themselves erected a reservoir at that point. There is no ditch connection with this reservoir, its object being by the defendants to collect the water during the night for use during the day further down the ravine.

"Plaintiffs allege that had they been permitted to divert the water at the point selected by them in November, 1859, they could have sold the water they intended to convey for at least ten dollars per day, from the eighteenth of November until the trial of this cause; and being prevented by defendants, they have been damaged to that extent, and pray judgment. They further allege that they have been damaged ten dollars per day by the wrongful acts of defendants in diverting the water from the small dam of plaintiffs by which the water was diverted to the tunnel of plaintiffs, from the eighteenth of November until the present time, and pray judgment.

"The complaint claims the ownership of the entire water of Saw Mill ravine, with its tributaries, from the dam of plaintiffs, located in 1853 by Lehman & Co., to the source of the ravine, with the exception of that portion appropriated by

the Gregory ditch; and upon this proposition of ownership from their dam to the source of the ravine, claim the right to divert the water at any point, or at any time they may see proper, without reference to any rights that may have arisen above their dam since its location, in November, 1853."

The judge below then cites *Kidd v. Laird*, 15 Cal. 161; *Bear River Co. v. York Mining Co.* 8 Id. 327; *Butte Canal Co. v. Vaughn*, 11 Id. 143, and then proceeds:

"Under these decisions, plaintiffs, by the location of their ditch in 1853, were entitled to the water of the ravine in quantity sufficient to fill their ditch; that quantity they were entitled to have flow to them undiminished and uninterrupted; but if deteriorated, in quality, they could not complain, unless the language in the *Butte Canal Co. v. Vaughn*, was intended to modify the proposition in the *Bear River Co. v. York Mining Co.*; and if so, then the plaintiffs had the right to insist that the water flowing to them should not be so impaired in quality as to defeat the purpose of their appropriation. This was the extent of their rights and no more. Subject to those rights, defendants might locate above them, and use the waters of Saw Mill ravine as they might see proper. When such location and appropriation of the water had been made by defendants, their right to the use and enjoyment of the water was as proper as that of plaintiffs. The plaintiffs could no more turn the water away from the dam of defendants located in 1855, than the defendants could divert the water from the dam of the plaintiffs located in 1853."

"The defendants could impose no more conditions upon plaintiffs respecting the use of the water by the plaintiffs at their dam of 1853, and after the location of defendants' dam in 1855, plaintiffs could impose no conditions upon defendants, as to the use of the water, other than those that existed in favor of plaintiffs prior to the appropriation of defendants. The same rule would follow as to each subsequent appropriation of the water of the ravine, and each subsequent locator takes the use of the water, subject to the conditions imposed upon the use of the water by the appropriation made in 1855."

"But, ask the plaintiffs, can we not change our location, and tap the stream at a different point? Certainly, this can be done, as decided in *Kidd v. Laird*, but with this proviso,

that the change of location shall not injuriously affect the rights of others. When the defendants located their dam in 1855, and appropriated the water of the ravine at that point to the extent of the capacity of their ditch, they acquired the same right to the use of the water, as against subsequent locators above them, as the plaintiffs acquired by the location of its dam in 1853; that is, the defendants acquired the right to demand that the water from above should flow to them undiminished in quantity, uninterrupted in flow, and not so impaired in quality as to defeat the purpose of their appropriation. The plaintiffs would have no more right to infringe these conditions imposed upon the use of the water by defendants, by going above defendants and locating a new dam, than a stranger.

“The complaint alleges that one right of damages accrued to plaintiffs by the defendants refusing to permit plaintiffs to tap the stream above the dam of defendants, and convey the water to some mining locality where it might have been sold. This would have diverted it entirely from defendant's dam and ditch, and would have been in violation of defendants' rights. The court is of opinion that plaintiffs can not claim damages for being prevented from doing an unlawful act, and one which, if done, would have subjected the plaintiffs to an action for damages.

“As to the claim of damages for diverting the water from the dam and ditch of plaintiffs, located in 1853, to convey water to their tunnel claim, no water was in fact diverted from this dam, but the gravel and sediment that flowed down Saw Mill ravine from the mining claims of defendants, and the gravel and sediment which flowed down from Campbell's ravine into Saw Mill ravine from the claims of Gregory & Co., did fill the dam and trough of plaintiffs, so that the water could not flow through it to the tunnel claim.

“The mining claims of defendants upon the bank of the stream and the mining claims of those to whom defendants are selling water, were all taken up and worked before the plaintiffs located the dam to divert the water to the tunnel claim. The debris of defendants and other claims above flow naturally and of absolute necessity down the channel of the ravine to the new dam of plaintiffs. The plaintiffs must ac-

cept this new location of 1858 as they found it, and subject to the prior rights of prior location; and if plaintiffs have sustained an injury from the use of the prior right, which injury was an absolute necessity if the prior right were used at all, it is an injury for which plaintiffs can not recover damages.

“The only prior right, as against defendants, shown by the plaintiffs, is the ditch located in 1853. To this ditch the water has continued to run uninterrupted and undiminished, so far as the evidence shows.

“The conclusion of law is, that the injuries complained of are such as plaintiffs are not entitled to compensation for in damages, and that plaintiffs should take nothing by this action.”

Judgment for defendants; plaintiffs appeal.

WM. H. RHODES, for appellants.

H. G. & W. H. BEATTY, for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

This is an action for damages and for the restitution of certain premises described in the complaint. The facts are clearly stated in the findings of the court, and the conclusion arrived at is undoubtedly correct. The principal question is, whether a person appropriating and diverting the water of a stream at a given point can afterward change the point of diversion to the prejudice of a subsequent appropriator? The case of *Kidd v. Laird*, 15 Cal. 161, and the authorities there cited, are decisive of this question, and it would seem that the position of the appellants is based upon a misconception of the doctrine enunciated. They appear to regard the right to change the point of diversion as absolute and unqualified, whereas the rule is that the change must not injuriously affect the rights of others. This we expressly declared, and our views upon the subject have undergone no modification.

One of the grievances of which the plaintiffs complain is that they were ejected from the possession of certain ground,

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occupied by them for the purpose of constructing a dam and ditch. The object was to divert the water away from the defendants, and we think the plaintiffs have no right to complain of means adopted to defeat this object. As against the defendants, the diversion would have been illegal, and we regard their action in the premises as a proper and legitimate mode of averting the injurious consequences.

Judgment affirmed.

EVERETT ET AL. V. THE HYDRAULIC FLUME TUNNEL
Co.

(23 California, 225. Supreme Court, 1863.)

¹ **Injuries from breaking dam.** If a dam constructed in a good and workmanlike manner, and used with reasonable care, breaks at a high stage of water and injures mining claims below, the owners of the dam are not liable for the damages.

Appeal from the District Court, Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the court.

MCRÆ & BEATTY, for appellants.

F. C. LOTT, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action to recover damages caused by the breaking of a dam owned by the defendants. The plaintiffs are the owners of mining claims and sluice-boxes below the defendants' dam, which broke at a high stage of water, and, as is alleged, injured the plaintiffs' property below. The case was tried by the court, who found for the defendants, and the

¹ *Richardson v. Kier*, 4 M. R. 612; *Turner v. Tuolumne Co.*, 1 M. R. 107; See NEGLIGENCE.

plaintiffs appeal. The court found that the dam was "well built, and constructed in a good and workmanlike manner, and of sufficient strength and capacity to contain the amount of water within it;" that no negligence on the part of the defendants was shown, and that they used that reasonable care and diligence which prudent men would have used, in the erection and care of the dam. Under these findings, the court properly rendered judgment for the defendants, as the case comes clearly within the rule laid down in *Hoffman v. The Tuolumne Water Company*, 10 Cal. 413, and *Wolf v. The St. Louis Independent Water Company*, Id. 541. But the appellant insists that the findings upon these points are not sustained by the evidence. We have carefully examined the record, and see no error in these findings. They are fairly sustained by the evidence.

The judgment is therefore affirmed.

¹ NATOMA WATER AND MINING CO. v. MCCOY ET AL.

(23 California, 491. Supreme Court, 1863.)

Interruption of flow of water. The prior appropriator of water may recover damages for an irregular flow of water in his ditch caused by a dam erected on the creek above the head of his ditch if the injury sustained is not a mere temporary or trivial one.

²**Evidence—Loss of customers.** On the trial of an action for interference with the flow of water in a ditch for supplying mines, proof that in consequence of the irregularity of the flow of water the owners of the ditch have lost their customers, is competent evidence "as showing that the damage to the plaintiff was not trivial or temporary, but of such a character as to cause actual and serious injury."

Appeal from the District Court, Sixth Judicial District, City and County of Sacramento.

This action was commenced on the twenty-first day of June, 1861. The complaint averred that plaintiffs for four years

¹ *Proctor v. Jennings*, 4 M. R. 265; *Bear River Co. v. Boles*, 4 M. R. 592.

² *Clark v. Willett*, 4 M. R. 628.

had owned and possessed a water ditch, starting out of Alder creek, about one mile below Prairie City, by which ditch plaintiffs had appropriated and used the waters of said Alder creek for mining purposes, during all that time, except as disturbed by defendants; and that defendants, about the first day of June, 1861, had erected a dam across Alder creek, about one half mile below Prairie City, by which they had obstructed the flow of water in Alder creek; and that plaintiffs had suffered great loss by means of the irregularity of the flow of water, and would sustain a loss of one hundred dollars per week in future, etc. The answer set up that defendants were miners, and had entered upon the bed of Alder creek for mining purposes, and had erected a dam and placed some twenty sluice-boxes in the bed of the creek, each about twelve feet long, and that by means of the dam they conducted the water through the sluice-boxes, and emptied it again into the creek, about one fourth of a mile above plaintiffs' dam. The answer also denied that plaintiffs had sustained, or would sustain, any injury from defendants' acts. The jury found a verdict for defendants. Plaintiffs moved for a new trial, which was denied by the court, and from the order denying a new trial, plaintiffs appealed.

A. P. CATLIN, for appellants.

FRANK HEREFORD, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action to recover damages, arising from an irregularity of the flow of water to the plaintiffs' dam and ditches on Alder creek, caused by a dam erected by the defendants on the creek above. The right of the prior appropriator of water to recover damages for such an injury was settled by this court, in the case of *The Phoenix Water Co. v. Fletcher*, 23 Cal. 481.

At the trial, the court excluded the evidence offered by the plaintiffs, to show that the irregularity of the flow of water was a material injury to them, as in consequence of such

irregularity they lost their customers, who refused to purchase water from them. In the case above referred to, it was held that a mere temporary or trivial irregularity in the flow of water, such as does not cause actual injury to the proprietor below, would not amount to an actionable injury. The question will turn, in such cases, upon the nature and extent of the injury. In such cases, evidence of the kind offered by the plaintiffs was clearly admissible, as showing that the damage to the plaintiff was not trivial or temporary, but of such a character as to cause actual and serious injury to him. More pertinent evidence to prove that fact could hardly be produced. The court, therefore, erred in excluding it. The fact that the defendants are miners, and hold the water back, causing it to flow irregularly to the plaintiffs, who are prior appropriators of the waters of the stream, does not take the case out of the rule laid down in the case of *The Phoenix Water Co. v. Fletcher*.

The judgment is reversed and the cause remanded for a new trial.

THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY V. BOLES ET AL.

(24 California, 359. Supreme Court, 1864.)

¹ **No equitable relief to idle ditch.** In a suit for damages by a ditch company and to abate as a nuisance two reservoirs constructed across the bed of the stream which supplied the ditch with water, by which the waters were collected and detained so as to prevent a regular flow in the ditch: *Held*, that testimony was properly admitted in defense, showing that the ditch had for a long time been out of repair and unfit for use and unused: *Held, also*, that the ditch company had only a right by prior appropriation to the use of the water in its natural flow; that other parties had a right to use it, so long as its use did not interfere with the rights of the ditch company, and that no action could be maintained to abate the reservoirs as a nuisance until the ditch was in condition to carry water.

Interested witness—Waiver. An objection to the testimony of a witness on the ground of interest should be made as soon as it appears that he is interested, and a failure to do so then, is a waiver of the objection.

¹ *Dorr v. Hammond*, 1 West C. R. 357, 7 Colo. —; *Sieber v. Frink*, 7 Colo. —; *Nevada Co. v. Kidd*, 37 Cal. 283.

Appeal from the District Court of Placer County, Eleventh Judicial District.

TUTTLE & FELLOWS, for appellant.

JO. HAMILTON, for respondents.

By the Court: SAWYER, J.

The complaint alleges that the plaintiff is the owner of a ditch cut for the purpose of conveying the waters of Rock creek to certain mining localities, for sale; that defendants, before the commencement of the suit, constructed two reservoirs in the bed of Rock creek, above the head of plaintiff's said ditch, by means of which the waters of Rock creek are collected and detained from one day to a week at a time, and then let down in large quantities by opening the gates of said reservoirs; that, by these means, the waters of said streams are not allowed to flow regularly or with a uniform current to said ditch; that if said waters flow down said ditch with a uniform and uninterrupted current, said plaintiff has now, and has had for more than six months last past, a market for the same by which it now can and could heretofore have realized about one hundred dollars per week for the same, by sale to quartz and placer miners; and that he would have said market for a great length of time hereafter; that by the interruption of the regular flow of the waters, as before stated, the plaintiff's customers are unable to use the same; that the market and sale of the said waters depend entirely on the uniform and natural flow of said waters; that if the interruption continues, the plaintiff will lose from fifty to one hundred dollars per week; that defendants are insolvent, and will be unable to respond in damages; that said reservoirs are a nuisance; and that the damages already accrued amount to five hundred dollars. Plaintiff prays judgment for the damages alleged, that the nuisance be abated, and the defendants be enjoined from obstructing, in future, the regular and uniform flow of said water.

The defendants in their answer, after denying most of the material allegations of the complaint and claiming a right to the waters in themselves, allege, among other things, that

for a long term of years said ditch has ceased to convey any water, and has been mined away at its head and at various other places, and since 1856 has been disused, and has neither carried nor been in a condition to carry any water; that said plaintiff, in and since 1856, sold water to various miners from another ditch owned by plaintiff, and that said miners, with the waters so purchased of plaintiff, with the knowledge, approbation and consent of the plaintiff, washed away and destroyed the ditch described in the complaint, to such an extent that it was wholly destroyed and unfit for conveying any water, and that since 1856 to the present time the said ditch, by reason of said washing away and destruction, has been and still is wholly unfit to carry any water. They deny that said waters have flowed in said ditch since 1856, or that said reservoirs have, in any manner, affected the flow of said waters into said ditch. They aver that if plaintiff had a ditch to convey the waters collected in said reservoirs, they would be as useful to plaintiff as they otherwise would be; that for the want of any ditch sufficient or fit to carry the said waters, the same flow down Rock creek, after being used by defendants, past the head of the ditch described in the complaint; that plaintiffs are not in a condition to use said waters until they rebuild the ditch which has been washed away as before stated.

The verdict of the jury and the judgment thereon were for the defendants, and plaintiff appealed.

On the trial, the defendants introduced testimony, under objection and exception on the part of the plaintiff, tending to prove the destruction and condition of the ditch as alleged in the answer, and the court instructed the jury as follows: "In determining the proposition whether defendants' reservoirs are a nuisance, you will look at all the evidence as to plaintiff's ditch and dam being out of order, and unable to carry the water, and take all the testimony that has been given into consideration." To the giving of which plaintiff excepted, and these rulings are relied on as error.

We think there was no error in admitting the testimony, or giving the instruction based upon it. The question was, whether the reservoirs were a nuisance in the then present

condition of things—not whether they might become a nuisance at some future time, when the plaintiff might see fit to put its ditch in a condition to enjoy its right to the water. The plaintiff only had a right, by virtue of prior appropriation, to the use of the water in its natural flow. Other parties above were equally entitled to its use, so long as it was used in such a manner as not to injure the plaintiff. If plaintiff's ditch and dam had, for seven years, or any less period of time, as defendants claim, been in such a condition that it was impossible to turn the water into the ditch, or for the ditch to carry it, the plaintiff could not be injured, or the reservoirs become a nuisance, until the ditch should be repaired and placed in a condition to be available for the purpose designed. An action could not be maintained to abate the reservoirs as a nuisance, till they actually became such. There is no claim that plaintiff was entitled to or desired the water for any other purpose than to convey in their ditch for sale.

But the plaintiff says there was also evidence tending to show that in 1860, a year or more before the reservoirs were built, the defendants themselves washed away plaintiff's ditch and dam, and that plaintiff at that time endeavored to repair it, and was prevented from doing so by the defendants, and for this reason the instruction was erroneous, and liable to mislead the jury. There are two answers to this: Firstly, the plaintiff is suing to abate a present nuisance, erected long since the transactions referred to, and not to recover damages for destroying plaintiff's dam and ditch in 1860, and a recovery must be had, if at all, upon the case stated in the complaint. Secondly, it is a question for the jury to determine what facts are established by the evidence, and they might have found against the plaintiff on that point. They were, therefore, entitled to "look at the evidence" referred to, as directed by the court, in connection with the other evidence in the case. For the same reasons, the instruction asked by plaintiff (which was precisely the reverse of the one given and just considered) was properly refused.

The defendants called one John Tyler as a witness. His first testimony was: "I am a member of the Boles claim; bought in when he did, and purchased from the same par-

ties." He then went on, without any objection, and testified at considerable length upon the merits of the case. After which the "plaintiff, by his attorney, moved to strike out the testimony of said witness, Tyler, because he was interested. Defendant objected, and the court sustained the objection, and plaintiff excepted to the ruling of the court." This ruling is assigned as error. Admitting, for the purpose of the decision, the notice given under section four hundred and twenty-two of the Practice Act to be insufficient to authorize the witness to testify, we think the plaintiff waived the objection on the ground of interest by not taking it in time. The witness distinctly informed them at the threshold of his testimony that he was interested. Then was the time to make the objection. Parties will not be permitted to experiment upon a witness by admitting his testimony without objection, and if it turns out to be favorable, accept it, but, if unfavorable, move to strike it out. Had the plaintiff been ignorant of the interest of witness till it was developed by his testimony at this point of the trial, and the plaintiff, as soon as the interest was discovered, had moved to strike out his previous testimony, the court would, doubtless, have granted the motion, if there was no other legal reason for denying it. But all the testimony sought to be struck out was taken without objection, after the witness had informed plaintiff and the court of his interest; and the motion was properly denied on the ground that the objection came too late.

The last error relied on in appellant's brief is that the verdict is not warranted by the evidence, and is against law. It is hardly necessary to say that the record does not present a case which, under the uniform decisions of this court, would justify us in reversing the judgment on this ground.

No error having been brought to our notice, the judgment is affirmed.

Affirmed.

HILL v. SMITH.

(27 California, 476. Supreme Court, 1865.)

Pleading—Form of denial. Any form of denial which meets and traverses the allegation, is admissible. If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed.

Evidence sufficient to justify findings relative to gold mining. A jury is justified in finding that the defendant is engaged in mining for gold when both plaintiff's and defendant's witnesses speak of his "claim," and of his labor as "mining," and also of his "sluice-boxes," "wing dam," and of his mode of "working claim" and "depositing tailings," when there is no counter testimony.

¹ **Damage from mining above ditch head.** A miner who works his claim above the head of a ditch previously located, so as to mingle mud and sediment with the water, and thus injures it for the use to which the ditch owner has applied it, or so as to fill up the ditch and reservoirs, thus lessening their capacity and increasing the expense of cleaning them, is liable for the damages thereby occasioned.

Special injury to water used by hydraulic, on account of sediment, considered as an element of damage in action for filling ditch with debris.

Idem—Reasonable care no excuse. How carefully or cautiously the miner worked was a matter of no consequence, for if his work in fact injured the ditch owner, he was none the less liable to an action.

Dictum: Damnum absque injuria. The notion that, as between ditch owners and miners using the water of a stream in the mineral regions of the State for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior rights of the other, is without any substantial foundation.

Common law controlled by conditions. The *reasons* which constitute the groundwork of the common law upon the subject of water rights, remain undisturbed. The conditions to which courts are called upon to apply them are changed, and not the rules themselves. The maxim *sic utere tuo ut alienum non lædas*, has lost none of its governing force.

Maxims controlling the relative rights of miners and ditch owners and of prior and later appropriators.

² **Test of injury to water rights.** The question of injury to water rights by diminution or deterioration, must be determined in view of the use to which the water is applied, in connection with other circumstances. The question is, has the enjoyment of the water for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant?

¹ *Hill v. King*. 4 M. R. 533.

² *Union Co. v. Dangberg*, 2 Saw. 450; *Post* IRRIGATION.

Appeal from the District Court, Fourteenth Judicial District, Placer County.

This action was commenced May 26, 1863. The complaint averred the excavation of a ditch for the conveyance of water for mining purposes from Indian cañon to Iowa hill, by plaintiff's grantor, in 1852, and the continuous use of the water of the cañon in the ditch from that time up to the commencement of the suit; and that at the time the ditch was dug the water flowed down in a clear state, without any mixture of mud or sediment, and so remained until the acts of defendant complained of; and that the water, when in a clear condition, was more valuable and profitable to plaintiff for sale for mining purposes than when mixed with mud and sediment. That the defendant had been engaged for four weeks in digging up the bed of the cañon at points from six hundred to one thousand feet above the head of the ditch, and washing down the earth with the water into the ditch, thereby mixing the earth, mud and sediment with the water, so that the same settled in the bottom of the ditch and reservoirs, and lessened their capacity and increased the expense of cleaning the same. That the miners who purchased the water from plaintiff used the same through hose, and that when it was loaded with mud it destroyed their hose, etc., and that plaintiff's sales of water had been injured thereby.

The complaint prayed for judgment for damages, and for an injunction.

The answer did not deny in express language the allegations of the complaint, but in answer thereto stated that the waters of Indian cañon had not flowed down in a clear state, and that defendant had not washed any earth into plaintiff's ditch, etc.

The defendant, on the trial, proved that he had located a claim above the head of the ditch a short time before the suit was commenced, and was engaged in working the same, but introduced no evidence to show that he had found any gold there. The evidence showed that the bed of the cañon above the head of the ditch was about one hundred feet in width, that the earth was from three to four feet in depth, and that the defendant used the water of the cañon to work his claim, and that after the water left the claim it flowed into the ditch.

The court gave the following instructions to the jury, to which plaintiff excepted:

"It is very difficult to state with exactness the rights of a ditch owner as against miners who subsequently locate claims on the same stream above the head of the ditch. Our courts have endeavored to adopt those rules in relation to the subject which will allow, as far as possible, both these classes of locators upon the public domain to enjoy their property. Of course, if the first locator of a water ditch upon a clear stream was held to be entitled to the continuous use of the water in a pure state, then large regions of rich mining country would be kept from settlement and development. On the other hand, if miners were allowed to locate claims immediately above the heads of ditches, and to mine there to the same extent and with the same rights as elsewhere, then large ditches, costing thousands of dollars, would be unjustly at the mercy of every adventurer.

"The rule in such cases, so far as any can be definitely stated is this: The subsequent locators of mining claims on a stream above a ditch, which diverts water for sale to miners, have no right to work their claims, or run their tailings in such a manner as either to entirely obstruct the flow of water into the ditch, or to obstruct it to any considerable extent, or to diminish the quantity of water belonging to the ditch, or to so deteriorate the quality of the water as to render it unfit for mining purposes, or to so fill up the ditch with sediment as to materially lessen its value; but the mere fact that their mining operations *muddy* the water, rendering it less valuable, though not unfit, for mining purposes, or deposit sediment in the ditch to only such an extent as may be easily removed, without great cost, does not render them liable in an action like the one at bar.

"If, therefore, in this case you believe from the evidence that defendant is the *bona fide* owner of mining claims on the stream above the head of plaintiff's ditch; that he worked his claims in a reasonable manner, using all due precaution to prevent injury to the ditch; that the effect of his mining was only to muddy the water, but not to diminish its quantity, or to materially injure the ditch or the water, then de-

fendant is not liable. But if you believe defendant's mining operations seriously obstructed the flow of water into plaintiff's ditch, or diminished the quantity of water flowing into it, or in any manner materially injured the ditch or the water, then you should find for plaintiff, giving her nominal damages, of course, and such actual damages, not exceeding three hundred dollars, as you believe from the evidence she sustained."

The defendant recovered judgment, and the plaintiff appealed from an order denying a new trial and from the judgment.

The other facts are stated in the opinion of the court.

TUTTLE & FELLOWS, for appellant.

JO. HAMILTON, for respondent.

By the Court, SANDERSON, C. J.

The objection to the form in which many of the allegations contained in the complaint are denied is not a substantial one in our judgment. Any form of denial which fairly meets and traverses the allegation is admissible. Suppose it is alleged in a complaint that the defendant at a certain time made and delivered to the plaintiff his certain promissory note, etc., is not this allegation as directly and fairly traversed by saying: "I did not, at the time specified, or at any other time, make or deliver to the plaintiff the note described in the complaint," as by saying: "I deny that on the day specified, or at any other time, I made or delivered to the plaintiff the note described in the complaint?" We think both serve equally well to form the issue. The former mode (which is the one adopted in this case) is less usual than the latter, but we are unable to perceive why it is not equally as good. It matters but little which form is adopted. If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed. The denials in this case do not appear to be evasive, but on the contrary, we think they fairly meet the issues tendered by the complaint.

We are also of the opinion that there is nothing in the point made by counsel for appellant to the effect that the mat-

ter set out in the answer by way of excuse or justification is unsupported by the evidence. Assuming that the jury must have determined at the threshold of their investigations that the digging by the defendant of which the plaintiff complained was done by him in good faith, in pursuit of gold, we think the evidence upon that point, in the absence of any counter testimony, was sufficient to sustain their finding. All the witnesses, including the plaintiff's, speak of the defendant's "claim," and of his labor as "mining." They also speak of his "sluice-boxes," "wing dam," mode of "working claim" and "depositing tailings," all of which are familiar terms in the vocabulary of the miner, and would hardly have been employed by the witnesses had not the defendant been engaged in mining. From these circumstances, and in the absence of all counter testimony, the jury were justified in finding that the defendant was engaged in mining for gold. If they erred at all, it was not in so finding the fact, but in attaching to it, when found, too much importance, and regarding it as a justification on the part of the defendant, as they seem to have done, for whatever injuries he may have caused the plaintiff by his mining operations. And this brings us to the principal and most difficult question involved in this case.

After a careful examination of the evidence, we are impressed with the conviction that the plaintiff ought to have recovered. And we can only account for the verdict upon the hypothesis that the jury misapprehended the law of the case. The plaintiff's prior right is unquestioned. That the defendant's work caused large quantities of rubbish and sediment to be deposited in plaintiff's reservoir and ditches, thereby lessening their capacity and entailing upon her additional expense in cleaning them out and maintaining their original capacity, hardly admits of debate. And it is very clear from the evidence that the value of the water for mining purposes, by reason of the mud and sediment mixed with it by the defendant's mining operations, was diminished by from one fourth to one half. It appears that the plaintiff's ditch supplied water to hydraulic claims which require water, as was clearly shown, in a purer state than claims worked by the sluicing process or method, in order to work them successfully. Where she had

previously sold only sixty inches of water she was compelled to sell a hundred and a hundred and twenty at the same price in consequence of the deterioration of its solvent capacity by reason of the sediment and mud from defendant's claim. It further appears that on one or two occasions the miners, or some of them, who purchased water from the plaintiff, quit work entirely, because the water was so thick with sediment that it could not be used with any reasonable success in hydraulic mining. To say that such injuries are immaterial, and therefore constitute no cause of action, is to trifle with the prior rights of the plaintiff and misrepresent the law. There seems to have been a successful effort made on the part of the defense to prove that the defendant had studiously conducted his mining operations in such a manner as to cause the least possible injury to the water rights of the plaintiff. It is probable that the jury supposed that, having thus worked, the defendant was not responsible for injuries unavoidably resulting from his work, upon the vague notion that everybody has a right to mine at such points as he may choose, provided he causes as little injury to others as is possible under all the circumstances. Such is the only theory upon which we can account for the verdict. Some stress was placed upon this testimony by the judge, and while we think it was not intentional, the general and abstract terms in which the instructions of the court were couched were, to a certain extent, as it appears to us, calculated to convey to the jury the idea that such was the law of the case. How cautiously or carefully the defendant worked was a matter of no consequence, for if his work in fact injured the plaintiff, he was none the less liable to an action. Moreover, the entire charge impliedly if not expressly proceeds upon and sanctions the idea that as between ditch owners and miners using the water of a stream in the mineral regions of the State for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior rights of the other. This is due in a great measure doubtless to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to

exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non lædas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream in its natural channel—*ubi currere solebat*—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned upon which the rule is founded is equally as applicable to the ditch owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights to a like use by the other. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes. So that in all controversies like the present the question to be determined after all is the same as that presented by a like controversy between riparian proprietors, to wit: has the plaintiff's use and enjoyment of the water *for the purposes for which he claims its use* been impaired by the acts of the defendant? This is purely a question of fact for the jury, and all the law applicable to it is found, as stated by the learned counsel for appellants, in the case of the *Phoenix W. Co. v. Fletcher*, 23 Cal. 483, embraced in the three following maxims: *Qui prior est in tempore, potior est in jure; Ubi jus, ibi remedium; Sic utere tuo ut alienum*

non lædas; and beyond these principles they do not require to be instructed. What diminution in quantity or what deterioration in quality will injuriously affect the use of the water by the plaintiff may be safely left to the determination of the jury, guided only by the foregoing maxims. It may be that a slight diminution or deterioration will impair his use of the water, and it may be that such use would not be impaired by a very considerable reduction in quantity or quality. The question must be determined *in view of the use to which the water is applied* and the other circumstances developed by the testimony.

Judgment reversed and new trial ordered.

DAVIS ET AL. V. GALE.

(32 California, 26. Supreme Court, 1867.)

¹ **Change in use or place of user.** A party acquires a right to a given quantity of water by appropriation and use, and he loses the right by non-use or abandonment. Appropriation, use and non-use are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it.

² **Evidence to show abandonment.** The fact that water was appropriated for a particular purpose, and that the purpose had been fully accomplished, and the further fact that the parties concerned in the appropriation had dispersed to other parts and had given no attention to the ditch for the period of two years, except only to make a sale of it for a nominal sum: *Held*, competent evidence to show abandonment.

Sale of abandoned water right. A sale of a water right by one who has abandoned it will not revive the right secured by his original appropriation.

³ **Statute of Limitations.** Although the plaintiffs may have had the prior right to water, yet if they or their grantors allowed the defendant to acquire and hold for five years adverse possession of the water which they had appropriated, or any part thereof, they, to that extent, lost their right by force of the statute.

¹ *Woolman v. Garringer*, 1 M. R. 675; *Sieber v. Frink*, 7 Colo. —; *Morris v. Bicknell*, 1 M. R. 601.

² *Derry v. Ross*, 1 M. R. 1.

³ *Smith v. Logan*, 1 West C. R. 391.

Water turned into stream by strangers. If the volume of water in a stream is increased by the acts of third parties, without any intention of recapture by them, such increase becomes *publici juris*, and the relative rights of appropriators along the stream remain the same as before. The case is not different from an increase from natural causes.

Rights by adverse possession, when not prejudiced. One who has adverse possession of water as against the prior appropriator does not prejudice his right by the fact that he allows a certain quantity of water to run down to miners at work below. Such an act is no concession to the prior appropriator.

Appeal from the District Court of Tuolumne County, Fifth Judicial District.

This action was commenced in October, 1864. In 1852, the Tuolumne Water company excavated a ditch from the Tuolumne river and Five Mile creek. This company had a surplus of water which it turned into Mormon creek above the heads of plaintiffs' and defendant's ditches, until the summer of 1864, when it was able to use it all by an extension of its ditch. There was a company of miners at work in the bed of Mormon creek below the head of defendant's and above the head of plaintiffs' ditch, who claimed the right to have water flow down the creek to their claim. The defendant, from 1853 up to the commencement of the suit, had been in the habit of turning down to this company of miners, from twenty-seven to forty-five inches of water, when they needed it to work their claim. Some miners also constructed a flume along the bed of the creek above the head of defendant's ditch, which it was claimed increased the flow of water to the head of defendant's ditch. Defendant claimed the first right to this increase of water. Defendant asked the court to instruct the jury as follows:

"If there is water enough in Mormon creek during a great portion of the year to supply both defendant's and plaintiffs' ditches, then both parties have the right to use said water as long as they do not interfere with the rights of each other; but if, during a portion of the year, to wit, the latter part of the dry season, there is not water enough in said creek to supply both of said ditches to their full capacities, and if during such scarcity of water defendant, with full knowledge of plaintiffs, appropriates all the water of said

creek and turns it into his ditch, claiming title thereto, that such appropriation, use, occupation and possession of the first use of said water by defendant, is adverse to the claim of plaintiffs to said water, and if the jury find, from the evidence, that the defendant has so appropriated and possessed the first use of said water quietly, peaceably and without let or hindrance from any one, whenever there was such scarcity of water for a period of over five years, during the dry season, next before the commencement of this suit, then they must find for the defendant.

“If during the dry season defendant turned out forty-five inches of water from his ditch into the creek, or let it pass the head of his ditch, for the use of miners at work on the banks of the creek below, and if after said water has been used plaintiffs turn it into their ditch, there not being enough to give them a supply, such use of the waters by plaintiffs is no interference with the quiet, peaceable and adverse use of the water by defendant.

“If you find that the plaintiffs’ grantors originally took and appropriated six streams of water, and the defendant thereafter took and used five of such streams, continuously and uninterruptedly, for a period of five years prior to the commencement of this action, with the knowledge of plaintiffs or their grantors, in such case the defendant would acquire an absolute right to such five streams so taken and used by him, by virtue of the Statute of Limitations, notwithstanding the plaintiffs used their ditch and the remaining stream of water during said five years continuously, and the plaintiffs can not recover such five streams in this action.”

The court refused said instructions, and defendant’s counsel excepted.

The words “stream of water,” as used in the last of said instructions, was defined on the trial by witnesses to mean a sluice head of twelve inches.

The other facts are stated in the opinion of the court.

CALEB DORSEY, for appellant.

E. F. HUNTER and GEORGE CADWALADER for respondents.

SANDERSON, J.

Action to restrain the defendant from diverting the waters of Mormon creek, in Tuolumne county, to the prejudice of the plaintiffs' prior rights, and for damages already sustained. The case was tried with a jury in the court below, and a general verdict in favor of the plaintiffs was rendered. Under the direction of the court, the jury also rendered a special verdict, in view of which it was claimed by the defendant that the judgment should go with him. The court held otherwise, and rendered a judgment for the plaintiffs for the amount of damages found by the jury, and perpetually restraining the defendant from interfering with or diverting the waters of the creek at any time in such a manner as to interrupt or disturb the use of the plaintiffs to the extent of their interest therein, which was fixed at sixty-two inches. A motion for a new trial was made and denied.

The complaint is in the usual form in such cases. An appropriation and continuous use of the waters of Mormon creek, running as far back as the spring of 1851, for mining and agricultural purposes, by means of a ditch dug for that purpose, is alleged; and also a subsequent diversion of the water to the prejudice of the plaintiffs by defendant, by means of a ditch which taps the creek at a point above that of the plaintiffs.

The defendant denies the prior right of the plaintiffs, and sets up a prior right in himself, and avers an appropriation and continuous use of the waters of the creek to the capacity of his ditch, which is four hundred inches, for mining and agricultural purposes, from a date prior to the appropriation of the plaintiffs.

The defendant further alleges that the plaintiffs' ditch was dug out and the waters of the creek appropriated by them or their grantors solely for the purpose of working a few mining claims which belonged to the first owners of the ditch; and that said claims were worked out, and, together with the ditch, abandoned by the then owners long prior to the time at which the plaintiffs became the owners or possessors of the ditch.

He further avers that he and his grantors have been in the

quiet and peaceable possession of the waters of the creek to the full capacity of his ditch for about thirteen years prior to the commencement of this action, without let or hindrance on the part of the plaintiffs or their grantors.

He also seeks the protection of the Statute of Limitations, and avers that neither the plaintiffs nor their grantors have been in the possession of the waters of the creek within five years next preceding the commencement of this action, except in subordination to the alleged right of the defendant to divert the same to the extent of four hundred inches.

No exceptions were taken to the admissibility of evidence, and all the questions made by counsel relate to the law of the case, as applicable to the facts specially found by the jury, and as construed by the court in refusing and giving instructions.

The plaintiffs' ditch was dug in March or April, 1851, and sixty-two inches of the waters of the creek thereby appropriated. The ditch was dug and said appropriation made solely for the purpose of working certain mining claims which belonged to the parties by whom the ditch was dug; and said purpose was fully accomplished prior to the fifth of July, 1855, which was the date at which the ditch was sold to Reynolds, Goodwin & Co., by whom the ditch was extended and afterward sold to Battenfield in May, 1858, who afterward sold to plaintiffs on the tenth of February, 1864. More than two years intervened between the date at which the mining claims were worked out and abandoned and the first sale of the ditch; during which time the owners made no use of the ditch, but went to other parts, leaving the ditch, however, in the care of one Demple, with license to use the same. The plaintiffs now use and seek to use the waters of the creek for mining and other purposes at other localities than those for which their ditch was originally constructed, which was also true of Reynolds, Goodwin & Co., and Battenfield, while they respectively owned the ditch.

The defendant's ditch was dug in August or September, 1851, and prior to any change in the use of the water by plaintiffs' first grantors.

The foregoing are all the facts that are useful in illustrating the points made upon the evidence. The other facts bear more especially upon the question of the Statute of Limitations, and will be noticed hereafter.

The fact that the plaintiffs' ditch was dug and their appropriation first made solely for working certain mining claims, long since worked out and abandoned, gives rise to the principal question. In view of that fact it is claimed that the plaintiffs' first grantors lost their right to the use of the waters of the creek the moment the purpose for which they first appropriated them had become accomplished, and that neither they nor their grantors could thereafter rightfully claim the use of the water on the score of their original appropriation, for the purpose of working other claims, and that hence, conceding the original appropriation of the plaintiffs to have been prior to that of the defendant, the relative rights of the parties became changed when the original object of the plaintiffs had been accomplished, and thereafter the defendant became first in right and the plaintiffs second.

How far a party's right to the use of water is limited by the object for which it was first appropriated arose in the case of *Maeris v. Bicknell*, 7 Cal. 261. Mr. Justice BURNETT, by whom the opinion of the court was delivered, said: "The next question which arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use without losing that priority as against those whose rights have attached before the change. This question we think can admit of but one answer. It would seem clear that a mere change in the use of water from one mining locality to another by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. It would destroy the utility of such works were any other rule adopted. As to the question whether a party can change the use of the water from one purpose to another without affecting his prior right, we express no opinion, as the point does not arise in this case."

Some doubt as to the soundness of this view seems to have been afterward entertained, but for what reason we are at a loss to perceive. In *McKinney v. Smith*, 21 Cal. 383, Mr. Justice NORTON said: "We are aware that in the case of *Maeris v. Bicknell*, it was decided that a party who makes an appropriation of water can change the place of its use, as by an extension of the ditch, without losing his priority as against those whose rights have attached before the change; but the

court expressly reserved the expression of any opinion whether a party could change the use of the water from one purpose to another without losing his priority. * * * There may be difficulty, in many cases, in determining that the appropriation was limited to a special purpose or to a particular locality. Each case must be decided upon its peculiar facts. * * * On the facts as they existed when the defendants began their works they had the right to appropriate the water to any use that would not interfere with the plaintiffs' use of it for the special purpose to which they had appropriated it."

Suppose a party taps a stream of water for the purpose of surface mining in a given locality, and afterward finds that the ground will not pay, or that ground further on will pay better, may he not abandon the former and extend his ditch to the latter without losing his priority? Or suppose, after working off the surface, he finds quartz, may he not erect a mill and convert the water into a motive power without forfeiting his prior right? Suppose he appropriates the water for the purpose of running a saw mill, and, after the timber is exhausted, he finds that a grist mill will pay—may he not convert the former into the latter without surrendering his priority to some one who may have subsequently and in the meantime tapped the same stream?

We think all this may be done, and are unable to suggest a plausible reason why it may not. In cases like the present a party acquires a right to a given quantity of water by appropriation and use, and he loses that right by non-use or abandonment. Appropriation, use and non-use are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges. The water rights involved in this case may not be of great value, and their acquisition may not have been attended with much expense, but there are many similar privileges which have been secured only by the use of large sums of money; and to

hold that they are limited to the particular place or to the particular purpose in view of which they were first sought would for obvious reasons lead to most pernicious results, and greatly delay and embarrass the development of the resources of the country.

The only question which can legitimately arise in connection with the facts under consideration is abandonment. The fact that the water was appropriated solely for a special and particular purpose, and the further fact that that purpose had been fully accomplished, and the further fact that the parties concerned in it had dispersed to other parts, and that more than two years were allowed to pass without their giving any attention to the ditch, and then only to make a sale of it to others at the nominal sum of twenty-five dollars, all bear directly on that question. In view of those facts, a jury might find abandonment, and in that event the subsequent sale to Reynolds, Goodwin & Co., whether in good faith or not, would not have revived the right which was secured by the first appropriation.

There was testimony tending to show that the defendant had been in the adverse possession of the water of Mormon creek, as against the plaintiffs and their grantors, to the capacity of his ditch, for more than five years prior to the commencement of the action, and the instruction asked by the defendant bearing upon the Statute of Limitations ought to have been given. Although the plaintiffs may have had the prior right, yet if they or their grantors allowed the defendant to acquire and hold for five years, adverse possession of the water which they had appropriated, or any part thereof, they, to that extent, lost their right by force of the statute. Upon this question, in *The Union Water Company v. Crary*, 25 Cal. 509, we had occasion to say that "The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted and adverse enjoyment of the water course, or of some certain portion of it, during the period limited by the Statute of Limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."

The fact that the Tuolumne Water Company at one time

turned water from their ditch into Mormon creek, thereby increasing the volume of water, and the further fact that some strangers flumed the creek between the defendant's ditch and that of the plaintiffs, have, as we conceive, no direct bearing upon the rights of either party. If the water of the Tuolumne ditch was turned in without any intention of recapture, it became *publici juris*, and inured as much to the benefit of the plaintiffs as the defendant. Their rights thereafter remained relatively the same as before, and were not differently affected than they would have been had the increase of water been due to some natural cause. So as to the fluming of the creek. If the effect was to decrease absorption and evaporation so that the creek thereafter would have delivered water at the plaintiffs' ditch at seasons when otherwise it would not have done so, the increased facilities inured as much to the benefit of the plaintiffs as if they too had resulted from some natural cause instead of the agency of strangers.

Nor was the adverse possession of the defendant, as against the plaintiffs, in any manner prejudiced by the fact that the defendant from time to time yielded to the demands of the miners at work below his ditch and allowed a certain quantity of water to flow down to them for their use. If that was the only reason why he allowed the water to pass, his doing so was no concession to the claim of the plaintiffs.

The order denying a new trial is reversed and a new trial is granted.

Reversed.

RICHARDSON V. KIER.

(34 California, 63. Supreme Court, 1867)

¹ **Injuries from overflow.** The owner of a ditch is bound to keep it in repair so that it will not overflow or break through its banks to the injury of lands of other parties; and if, through his fault in failing to keep it in repair, it washes away the soil or deposits sand on the land along which it passes, he is responsible therefor.

¹ *Ererett v. Hydraulic Co.*, 4 M. R. 589.

- ¹ **Natural channel—Ravine.** Where a natural ravine is adopted as part of the course of a ditch, the ditch owner is not responsible for an overflow of the water naturally running in such ravine. He adopts such natural water course only to the extent of the flow of his ditch, and is only responsible for the overflow of the water resulting from his use of the ravine for the purposes of a ditch.
- ² **Negligence.** "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but is always relative to some circumstances of time, place or person."
- ³ **Liability of ditch owner for overflow—Joint tort-feasors.** The owner of a ditch, the waters of which were discharged at such a point that they naturally would and did overflow and injure the lands of another, can not shield himself from responsibility because he may have sold the water to miners, who used it for mining purposes, if the water was delivered to the miners at a point from which it would unavoidably run upon the land and result in the injury complained of. Though the miners may be joint tort-feasors, that does not affect the question of the ditch owner's liability.

Appeal from the District Court, Fourteenth Judicial District, Placer County.

This was an action to recover damages sustained by plaintiff by the flooding with water, and the covering with sand and sediment, of his lands, situated on Coon creek, in Placer county, to which he claimed the title in fee, from the defendant's ditches, and for an injunction.

The acts complained of were thus stated in the complaint, to wit:

"Plaintiff further avers that the defendant is the owner of certain water ditches leading from Coon creek, called the Independent ditch and the North Sea ditch; said ditches sometimes called the Whisky Diggings ditches. Said ditches are extended by defendant out of said Coon creek several miles above plaintiff's said land, and are used by defendant to divert the natural waters of Coon creek, and also the waters of several ravines emptying into said ditches, over and through plaintiff's said lands, and discharge said waters so conveyed

¹ *Stone v. Bumpus*, 4 M. R. 271.

² *Campbell v. Bear River Co.*, 35 Cal. 679; *Post* NEGLIGENCE.

³ See *Schuylkill Co. v. Richards*, 57 Pa. St. 142; *Schuylkill Co. v. McDonough*, 33 Id. 73.

into Coon creek within plaintiff's land before described. Said waters, but for said ditch, would not flow upon plaintiff's said lands, and would not do any damage to said lands.

"Plaintiff further avers that defendant could easily carry said waters in said ditches without any injury to plaintiff's said lands; that the same, if confined in proper banks and levees, and if said ditches were kept properly cleaned out, would pass over said lands without injury to the same. Plaintiff further avers, that defendant has heretofore, to wit, before the wrongs and injuries complained of, promised, agreed and bound himself, to build and keep up proper banks and levees along said ditches, and to keep said ditches cleaned out. And plaintiff further avers that it is the duty of the defendant in conducting said waters over plaintiff's said lands so to confine them that they would not flow over or upon the lands of plaintiff, other than on the beds of said ditches.

"Plaintiff further avers that the defendant, not regarding his duty to keep up the banks and levees, and to keep said ditches cleaned out, has not kept said banks or levees up, nor has he kept said ditches cleaned out, but has wholly neglected and refused so to do. Plaintiff further avers that the defendant, since the first day of November, 1864, and on divers other days since that time, and continuously since that time up to the present time, has caused the said waters flowing in said ditches to flow over and upon said lands of plaintiff, and to convey upon them large deposits of sand, earth and gravel, and he has by said means covered up and destroyed a large portion of said lands, to wit, about twelve acres of said lands, with said earth and gravel, so as to materially injure and damage it and wholly destroy a portion of the same and the crops growing thereon, and render the said lands wholly valueless for any purpose. Plaintiff further avers that all of said damage is occasioned and caused by the willful and negligent acts of defendant, by neglecting and refusing to keep in repair the banks and levees on said ditches, and by willfully and wrongfully flowing the said waters in said ditches while the same were filled up, and the banks and levees thereof wholly neglected and not in proper repair. Said acts of defendant are willful, malicious and

neglectful, and are done by defendant with full knowledge and intent to damage plaintiff and do the damage aforesaid.

"Plaintiff avers that by the acts of defendant aforesaid, and by the overflow and covering up of the lands as aforesaid, he has already suffered damage in the sum of one thousand dollars. Plaintiff further avers that if said acts of the defendant are continued, that it will wholly destroy the lands lying on the bottom on the easterly side of said Coon creek, and said damage will be irreparable.

"Plaintiff further avers that the defendant threatens that he will, and plaintiff avers that he will, continue said acts of damage and injury to plaintiff, unless restrained by the order of this court.

"These premises considered, plaintiff sues and asks for a judgment against defendant for the damages aforesaid, to wit, said sum of one thousand dollars. Plaintiff further prays for an order forever restraining and enjoining the defendant from the further commission of the acts aforesaid," etc.

The answer denied all the material averments of the complaint, except the possession by plaintiff of the land to which he claimed title, and the ownership and use by defendant of the ditches described in the complaint, except as to "the North Sea ditch," in respect to which the answer denied that for two years before suit the defendant had used it to convey the waters of Coon creek, or any other waters, or for any purpose. The answer further denied that the ditches of the defendant pass over or through, or conduct water over or through plaintiff's land, or any part thereof. The answer then averred as follows:

"Defendant further answering avers that the Independent ditch, mentioned in complaint, was excavated in 1853, and starts out of the creek called Dry creek, at a point about ten miles easterly of the land described in the complaint, and passes over public lands of the United States to a mining district called Whisky Diggings, lying about two miles easterly from the land described as plaintiff's in the complaint, and is about sixteen miles in length, and of the capacity to carry about one hundred and twenty inches of water; that defendant, and those whose title he has acquired, have con-

tinuously since said ditch was excavated used the same for the purpose of selling water to miners during the wet season, and that there has been no water flowing in the same during the dry season.

“Defendant further answering, avers that the country through which said ditch passes is mineral land containing gold, and is, and during all of said time has been public land of the United States; and that at said diggings miners have been engaged in digging for gold, and the only use plaintiff has made of said water is to sell the same at the ditch to miners, who purchased the water at the ditch from plaintiff and conveyed the same to their own claims, and there used it as they saw fit.

“Defendant further avers that he has always kept said ditch in good repair, and since November 1, 1865, has not run his ditch more than half full of water from Dry creek, and that the only times when the ditch would be full of water would be when there was a heavy fall of water, and the rain-water from the hill-sides and ravines would fill the same.

“Defendant further answering avers that the lands described as plaintiff's in the complaint lie about two miles from defendant's ditch at its nearest point, and that the country easterly of said land is the public land of the United States, and abounds in gold, and defendant has only been engaged in diverting and selling water to miners on the public lands.”

The cause was tried before the court and a jury. On the trial the plaintiff introduced in evidence a patent from the State of California to L. R. and T. L. Chamberlain of the land described in his complaint, dated March 21, 1863; also, a deed dated July 11, 1864, from said Chamberlains to plaintiff, of the same lands; also a deed dated May 12, 1864, from John and Kate Ziegenbein to the defendant, of the ditches described in the complaint. He also introduced in evidence, under the objection of the defendant on the ground of irrelevancy, and under the defendant's exception to its admission, the following article of agreement, to wit:

“Article of agreement made this the 19th day of March, 1863, between John Ziegenbein of the first part, and T. L. and L. R. Chamberlain of the second part, witnesseth: That whereas, a suit is now pending in the District Court of the

Eleventh Judicial District, in the County of Placer, wherein said Ziegenbein is plaintiff and said T. L. and L. R. Chamberlain *et als.* are defendants, to enjoin the surveyor-general and register of the State land office from issuing a patent to said T. L. and L. R. Chamberlain for certain tracts of land specified in the complaint in said action; and whereas, said parties have agreed to settle and adjust the matters, in controversy in said action, and other matters of controversy between them, and whereas, the said Ziegenbein is the owner of two certain water ditches in the county of Placer, known as the 'Independent' and 'North Sea' ditches, which flow over and through certain lands owned and claimed by said T. L. and L. R. Chamberlain; Now, the said T. L. and L. R. Chamberlain hereby agree to execute to said Ziegenbein a good and sufficient deed of conveyance for a tract of land of about three acres in extent, which shall include the house, store, barn and other improvements occupied by said Ziegenbein upon a tract of land claimed by said T. L. and L. R. Chamberlain, the exact description of which the parties are unable to give, but which is to be correctly described in the deed to be thus executed, said deed to be executed within a reasonable time.

"And it is further agreed by and between said parties, that the said T. L. and L. R. Chamberlain shall, and they do hereby, release the said John Ziegenbein from all damages, claim or liability to them, or either of them, for or by reason of or caused by the flow of water and tailings from said ditches, or either of them, over any and all tract and tracts of land owned or claimed by said T. L. and L. R. Chamberlain, or either of them, or in which they or either of them have any right, title, claim or interest whatever, and also hereby release the said Ziegenbein and his sureties, Thomas Fairchild and S. W. McConaha, from all liability, claim or damage upon the injunction bond executed by said sureties and filed by said Ziegenbein in said action, in said Placer District Court; and they also hereby release the said Ziegenbein from all claim or liability for any damage or injury which may be caused by the flow of water and tailings from said ditches, as they now run over any and all lands owned or claimed by said T. L. and L. R. Chamberlain, or either of them, or in which they or either of them have any

interest, from this date up to the first day of July, A. D. 1863, after which time no water shall flow in any of said ditches, except as hereinafter provided; and after this date no water shall be sold upon any of the inclosed lands of the said T. L. and L. R. Chamberlain.

“The said T. L. and L. R. Chamberlain hereby further grant, sell and convey to the said Ziegenbein, his heirs and assigns forever, the right and privilege of flowing the water and tailings from the said ditches, and from the mining and other claims in which said water may be used, over and through the tract of land described in said complaint filed in said cause, and described as the southeast quarter of section number fourteen; it being understood that said ditch is to run where it now runs through said quarter, and in no other course or direction, nor upon any other than its present bed; and the said Ziegenbein is to keep the ditch and its levees and banks in good repair and order until it reaches Coon creek, and he is to be responsible for no damage which it or its waters may do after it reaches Coon creek.

“And the said John Ziegenbein hereby agrees, in consideration of the premises, to dismiss the said action, each party to pay his own costs.

“In testimony of all which we have each of us hereto set our hands and seals this date above written.

“JOHN ZIEGENBEIN, [SEAL]

“THOS. L. CHAMBERLAIN.” [SEAL]

The following were part of the instructions of the court to the jury, given at the request of the defendant, under the exceptions of the plaintiff, to wit:

“1. The proofs, before plaintiff can recover damages, must prove to your satisfaction that he has sustained damages by the act of the defendant.

“2. If defendant sold water at his ditch to the quartz mill company and parted with his right to the water at his ditch, and the quartz mill company took the water at the ditch and used it afterward as they pleased, defendant is not liable for damages plaintiff may have sustained, if any, from the use of the water by the quartz mill company.

“3. If the jury find as a fact that the defendant's ditch is on the public mineral lands, and that when defendant made

sales of the water from his ditch to miners or others, he sold the water at the ditch and merely measured it to the purchaser at the ditch, and the purchaser took it from the ditch and conveyed it by one of his own ditches to the place where he wished to use it, and used it as he pleased for mining, then the defendant is not liable for any damage that might result to plaintiff from the use of the water by the miner.

"4. If the jury find as a fact that the miners who used the water from defendant's ditch were at work on the public mineral lands about two miles from plaintiff's land, and that the water, after leaving the claims of the miners, flowed down a ravine which was a natural outlet, down to plaintiff's land, then defendant is not liable for the damage, if any, plaintiff may have sustained by the use of the water by the miners.

"5. The plaintiff avers in his complaint that the defendant is the owner of two ditches, called the Independent ditch and the North Sea ditch; and avers, also, that the defendant by these ditches takes the water out of Coon creek several miles above his land, and causes the same to flow on to plaintiff's land, and to convey thereon earth, sand and gravel. Plaintiff, if he recovers at all, can only recover damage for such injury as he has sustained by the act of defendant in washing sediment onto plaintiff's land by the water taken out of Coon creek, and the ravines on the line of the ditches, through the Independent and North Sea ditches.

"6. If the defendant, in the use and management of his ditch, has used ordinary care and prudence, and has not been guilty of negligence, he is not liable for damages which may have resulted from the water of his ditch flowing off from the public lands, when they had been used for mining, and running onto plaintiff's land, carrying sand and earth there."

The verdict and judgment were for the defendant, and the plaintiff moved for a new trial, on the grounds, to wit: first, the insufficiency of the evidence to justify the verdict; and, second, errors in law occurring at the trial, and excepted to by the plaintiff. The motion was denied, and the plaintiff appealed from the order denying said motion and from said judgment.

JO. HAMILTON, for appellant.

C. A. TUTTLE, for respondent.

By the Court, SANDERSON, J.

There is some ambiguity in the complaint, for which the plaintiff must be held responsible. It contains a paragraph which evidently has some reference to the agreement of the 19th of March, 1863, between Ziegenbein and the Chamberlains, as if the pleader intended to make it the foundation, in part, of his action, but the agreement is not declared on *in hæc verba* nor according to its legal effect, and we can not regard the action as founded upon it in any respect. In this view it becomes unnecessary to consider the effect of that agreement further than to say, that it is evidence tending to show that the ditch leading from Whisky ravine to Coon creek is the property of the defendant. We shall, therefore, for the purposes of our decision, consider the action as founded upon an alleged violation by the defendant of the maxim *sic utere tuo ut alienum non lædas*.

As affecting the liability of the defendant, the case made by the pleadings and the evidence has two aspects: first, regarding the ravine and the ditch leading from it to Coon creek as a part of the Independent ditch; and, second, regarding the Independent ditch as terminating at the ravine.

Under both these aspects, we assume that the damages sustained by the plaintiff resulted from an overflow from the ditch, or ditch and ravine, and not from an overflow of Coon creek. Of course, for damages caused by the latter, if any, the defendant is in no way responsible, so far as the case shows.

If the defendant has adopted the ravine as a part of his ditch, so that his ditch commences at Coon creek, several miles above the plaintiff's farm, and, crossing a part of his farm, terminates in Coon creek at a point below, he is bound to so use his ditch as not to injure the plaintiff's land, irrespective of the question as to which has the older right or title. He is bound to keep it in good repair, so that the water will not overflow or break through its banks and destroy or damage the lands of other parties; and if, through any fault or neglect of his in not properly managing and

keeping it in repair, the water does overflow or break through the banks of the ditch and injure the land of others, either by washing away the soil or by covering the soil with sand, the law holds him responsible. This, however, is to be taken with the qualification that where a ravine or natural water course is taken or adopted by a ditch owner as a part of his line of ditch, he is to be understood as so doing only to the extent of the capacity of his ditch. If there is natural water running in the ravine so adopted, he is not responsible for an overflow, so far as it may have resulted from water not discharged into the ravine or water course by him. In other words, the overflow must have resulted in consequence of his use of the water course as a part of his ditch, or he is not responsible. Hence, if the defendant's ditch commences and terminates at different points on Coon creek, and Whisky ravine is a part of it, the defendant is bound to see that the water conveyed by him through it does not overflow or break through; and if it does, through any fault or neglect of his, he is liable; but if the overflow would have taken place independent of his ditch, and limited use of the ravine as a part of his ditch, he is not liable. In the latter event any damages resulting to the plaintiff would be the effect of natural causes, for which the defendant could not be held responsible. "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; moreover it is not absolute or intrinsic, but always relative to some circumstance of time, place or person." (Broom's Legal Maxims, 329.)

If we assume, as claimed by the defendant, that his ditch terminates at the point where it intersects Whisky ravine, his duty and responsibility are not materially varied. If the plaintiff's land had been overflowed and covered with sand, and thereby rendered less valuable by reason of the defendant's having diverted the waters of Coon creek, and by means of his ditch caused them to be discharged into Whisky ravine instead of Coon creek, thereby increasing the volume of water which would have otherwise flowed through the ravine, the defendant is responsible. Nor can he shield himself from responsibility because he may have sold the water to

miners, who used it for mining purposes before it reached the ravine, if the water is delivered to the miners at a point from which it must unavoidably run into the ravine, and necessarily result in the injury complained of. In that event the miners are not the only tort-feasors. The act of the defendant is as wrongful as if he discharged the water into the ravine without first selling it. Without the water there would be no damage done, and it is furnished, or sent upon its errand of mischief, by the act of the defendant. The miners may be joint tort-feasors, but that question is not involved in this case. If the defendant finds it necessary or convenient to discharge the water from his ditch into Whisky ravine, or at a point from which they will naturally flow into that ravine, he is bound to see that no injury results to the plaintiff in consequence of his act, and if it does he is responsible.

It is not necessary to notice specially the instructions of the court. It is obvious on inspection that they are not in all respects consistent with the foregoing views.

The order denying a new trial is reversed and a new trial granted.

CARUTHERS ET AL. V. PEMBERTON ET AL.

(1 Montana, 111. Supreme Court, 1869.)

Cross-examination on the sources of appropriation. The defense to a suit for the diversion of water from Gold creek was that plaintiffs had only appropriated 100 inches of the water, and had always been allowed that much: *Held*, that defendants might show by cross-examination of plaintiffs' witness that the excess of water in plaintiffs' ditch over 100 inches came from another source than Gold creek.

No admission by failure to reply—Error without prejudice. It is error to instruct the jury that plaintiffs admit the allegations of defendants' answer by failure to file a replication; but when the allegations in the answer are also proved upon the trial, such instruction does not prejudice the plaintiffs' case.

¹ **Measurement of capacity of ditch.** The amount of water appropriated by a ditch should be estimated by measuring it according to miners' measurement, near the head of the ditch, when it is full or conveying all it has capacity to.

¹ *Ophir Co. v. Carpenter*, 4 M. R. 653 *White v. Todd's Val. Co.*, 4 M. R. 536.

Practice—Verdict and judgment not disturbed. Courts will not disturb a verdict where there is evidence to support it, or reverse a judgment where, from the whole record, justice appears to have been done.

New trial—Diligence—Cumulative evidence. A new trial will not be granted if the affidavits of newly discovered evidence do not show that diligence was used to obtain it, nor if the evidence is cumulative.

Appeal from the Second District, Deer Lodge County.

This action was commenced in the district court in November, 1868, by Caruthers and others against Pemberton and others. The plaintiffs owned a water ditch, known as the De Long ditch, which diverted the waters of Gold creek, in Deer Lodge county, prior to September 1, 1868. The defendants, who then did business in said county under the name and style of the Pioneer Ditch Company, owned a ditch, known as the Pioneer ditch, which diverted the waters of Gold creek about two miles above the head of the De Long ditch. The plaintiffs claimed that they were entitled by prior appropriation to the use of two hundred and fifty inches of water in the De Long ditch; and that the defendants, about September 1, 1868, wrongfully diverted the same and prevented it from flowing in their ditch. The prayer of the complaint was for a perpetual injunction restraining the defendants from diverting the water, and \$3,000 damages. The answer alleged that the capacity of the De Long ditch to convey water was no more than one hundred inches, according to miners' measurement; and that plaintiffs had always enjoyed the use of that amount since the construction of their ditch. No replication was filed by the plaintiffs.

The case was tried at the November term, 1868, and the jury returned a general verdict for defendants and also special findings. The court, KNOWLES, J., denied the plaintiffs' motion for a new trial, and they appealed.

The other facts appear in the opinion.

J. C. ROBINSON, for appellants.

CLAGETT & DIXON, for respondents.

SYMES, J.

This was an action brought by plaintiffs for damages for

the diversion of water by the defendants, which the plaintiffs claimed by prior appropriation for mining purposes, tried at November term of the district court, 1868. Verdict and judgment for defendants.

The complaint alleges in substance that plaintiffs on and prior to September 1, 1868, owned and possessed a water-ditch, of the capacity of two hundred and fifty inches, miners' measurement, in Deer Lodge county, Montana Territory. It being an artificial water-ditch for diverting the waters of Gold creek, and known as the De Long ditch, and claimed by prior appropriation, waters of said creek conveyed by said ditch to amount of two hundred and fifty inches. That on 1st of September, 1868, defendants wrongfully and unlawfully diverted the waters of said Gold creek and prevented same from flowing down plaintiffs' ditch, thereby damaging plaintiffs \$3,000, for which they sue.

Defendants' answer admits plaintiffs' possession of said ditch; denies that ditch was of the capacity of two hundred and fifty inches, and alleges that at the time of appropriation ditch would convey one hundred inches and no more, and denies the diversion of any water belonging to plaintiffs. Answer further alleges that in August, 1866, defendants and those under whom they claim appropriated all the waters of said Gold creek then unappropriated, and constructed a ditch to convey same to Pioneer gulch, which ditch was of the capacity to convey six hundred inches, more or less, and known as Pioneer ditch, and takes the water of said Gold creek about two miles above the head of said De Long ditch; that when Pioneer ditch was constructed De Long ditch would convey one hundred inches of water from said Gold creek and no more; that defendants were entitled to all the waters of said creek except one hundred inches, and had always allowed one hundred inches to flow down said De Long ditch without diversion. This case came up on order overruling motion for new trial, and errors and exceptions stated in the statement for same, as follows:

1. On the trial defendants ask plaintiffs' witness if he did not, in fall of 1866, when mining in Pike's Peak gulch, convey water from Pioneer gulch to where he was mining, which was objected to by plaintiffs as irrelevant; overruled and

exceptions. 2. Plaintiffs' witness, Cook, testified that the capacity of plaintiff's ditch was about one hundred and fifty inches. He thought so from amount of water flowing in Sharp and Williams & Co.'s bed-rock flume and amount they were compelled to use. On cross-examination, defendants asked witness if part of water in flume did not come out of Pioneer gulch? Objected to by plaintiffs as irrelevant. Overruled and witness answered, it did. 3. Defendants asked their witness if part of the water which came through De Long ditch in 1866 to mines, came from pioneer gulch? Objected to by plaintiffs as irrelevant. Overruled, and witness answered, it did. If plaintiffs' witnesses formed the judgment of the capacity of plaintiffs' ditch by the amount of water flowing into a flume some distance below head of ditch or into some mine, it was certainly relevant for defendants to cross-examine plaintiffs' witnesses, or show by their own witnesses that that portion of the water in the flume or flowing into the mines came into flume, mines or De Long ditch, below where said ditch took the water from said Gold creek. It might weaken their judgment or show that they knew nothing of the amount of water said ditch took from said Gold creek.

Plaintiffs excepted to the court, instructing the jury that plaintiffs admitted in their pleading that defendants had always permitted one hundred inches of water to flow down said Gold creek to said De Long ditch, because alleged in answer and no replication being filed by plaintiffs. The court erred in this instruction. Section 38, Civil Code, provides that the only pleadings on the part of the plaintiff shall be complaint, demurrer or replication to defendants' answer, and on the part of defendant shall be demurrer to complaint, or replication or answer to the complaint. Section 50 provides that where the answer contains new matter plaintiff may demur or move to strike out sham and irrelevant answers, or such part thereof as may be irrelevant, immaterial, etc. Section 65 provides that any material allegation of the complaint or cross-complaint, not controverted by the answer, shall, for the purposes of the action, be taken as true, and that the statement of matters in avoidance *shall, on the trial*, be deemed controverted by the adverse party. Distinct sections of the code prescribe what the complaint shall contain, also the

answer. But unlike most codes of the different States, there is in ours no section except those referred to which treats of a replication or from which we can deduce when it is necessary or what it should contain. Section 38 prescribes there shall be such a pleading as a replication, but no section states when it shall be necessary. Section 50 states that when answer contains new matter plaintiff may demur, move to strike, etc., but does not say he may reply. Section 65 states that material allegations in complaint or cross-complaint, not controverted, shall be taken as true, and that matter in avoidance in the answer shall be deemed controverted, thereby it seems to us saying that new matter in avoidance may not be controverted by a reply. In referring to the New York code we find the provisions as to the answer similar to ours, but a distinct section provides that a reply shall be necessary when the answer sets up new matter containing a counter-claim, and the decisions allow a reply only when matter is in the answer which entitles the defendant to affirmative relief against the plaintiff, or facts which would be sufficient to constitute a cause of action against the plaintiff: *Van Plead*, 616, 620, and cases there cited. The California code before amendment was the same as ours, and although the decisions on this question are not at present within reach of the court, it seems a reply was held necessary only when the new matter in the answer entitled the defendants to affirmative relief. The answer in this case contained no new matter constituting a counter claim, or entitling the defendants to affirmative relief, and no replication was necessary. But, on examination of the statement of evidence, it seems to preponderate in favor of the conclusion that the defendants always did allow one hundred inches to flow down to the De Long ditch, and the special findings of the jury show they so conclude. The plaintiffs' rights, therefore, were not prejudiced by this instruction.

Plaintiffs also rely on exceptions taken to the refusal of instructions offered by them, giving instructions offered by defendants, instructions given by court and special finding, submitted by the court to the jury. That evidence is insufficient to support verdict, newly discovered evidence entitling defendants to new trial, and order overruling motion for same.

Several instructions were asked by plaintiffs and refused; some asked by defendants and given, and several given by the court. Upon examining the instructions it is not seen how the jury were misled, or plaintiffs prejudiced by the ruling of the court, except it be in giving the second instruction given by court at request of the defendants, which instructs the jury that the measure of plaintiffs' right to water was the number of inches the De Long ditch would carry through to the place where it is to be used at the time of defendants' appropriation in the fall of 1866. The measure of plaintiffs' right would be the amount of water the said ditch would convey from said Gold creek without running over its banks, and not the number of inches it might convey to the place to be used, some miles, perhaps, distant. In running some distance to mines, much water might be lost by evaporation and seepage, depending on season of the year and state of the weather; and the amount of water appropriated could only be estimated by measuring it according to miners' measurement, near the head of the ditch, when it was full or conveying all it had capacity to. But, as the jury specially find from the evidence that the ditch was only of the capacity to convey one hundred inches to a claim near by, and further, that the plaintiffs appropriated but one hundred inches of water of said creek, and the evidence favors the findings, the jury were not misled by this instruction. Courts will not disturb a verdict where there is evidence to support it, or reverse a judgment when, from the whole record, justice appears to have been done. The affidavits of newly discovered evidence do not show what diligence, or that any, was used to obtain it, and the evidence shown is cumulative.

Exceptions overruled.

CLARK ET AL. V. WILLETT ET AL.

(35 California, 534. Supreme Court, 1868.)

Power of courts to pass upon authority of attorney. The defendants' attorney appearing on behalf of one of the plaintiffs, J., who was present in court, moved to discontinue the suit as to him, and presented an affidavit by J. that the suit had been brought without his consent and against his wish. Plaintiffs' counsel resisted the motion on the ground that the court had no power to inquire into his authority to appear for J.: *Held*, that attorneys are the officers of the court; they appear and participate in its proceedings by the license of the court, and if they undertake to appear without authority from the party whom they profess to represent, the act is an abuse of the license of the court, which, upon the application of the supposed client, the court has the power to inquire into and correct summarily.

Evidence of value of ditch—Measure of damages. In a suit by the owners of a water ditch to enjoin the defendants from further working their mining claims beneath the surface of the earth over which plaintiffs' ditch extended, for the reason that the ditch would be irreparably injured by the settling of the earth caused by such mining, the plaintiffs offered testimony as to the profits realized by them from certain mining claims, which they owned and worked with water from their ditch at a point below defendants' claim: *Held*, that the testimony could only be relevant as to the value of the ditch, and would not tend to establish such value, unless accompanied with further evidence showing that the claim could not be worked without the aid of the ditch. In the absence of such proof, the value of the ditch should have been proved in the ordinary way, by showing its capacity, the value of water for mining purposes in the vicinity, and the probable duration of the demand.

Opinion of experts—Cause of injury to water ditch. Witnesses called to prove the damages done to a ditch as the result of mining in proximity to it can not, on the direct examination, be questioned as to the effect of similar mining at points not in controversy, although the same kind of soil, etc., was alleged to exist at such points, so as to induce the idea of similar results, by comparison. The proper course in such cases is to take the opinion of witnesses who have examined the premises and are otherwise qualified to judge intelligently of the cause producing the injury.

Presumption as to findings. In such a suit, the trial being by the court without a jury and judgment rendered for defendant, if no findings of fact are made, the presumption is that all issues were found against the plaintiffs.

New trial when judgment is contrary to evidence—Rule the same at law and in equity. If upon appeal a substantial conflict appears in the testimony upon the issues, the judgment will be affirmed, but if not and the evidence is against the judgment, it will be reversed and a new trial granted, and this rule applies as well at law as in equity.

Injunction—Injury already comp'ete. Where a mining claim had been worked before suit in such a way by washing the earth from under the plaintiffs' ditch, that according to the testimony it must result in the ruin of the ditch from the work already done: *Held*, that further work on a valuable claim ought not to be enjoined, the result necessarily being injury to the defendants without benefit to the plaintiffs.

Prior appropriation—Ditch and mining claim. The case of conflict between a ditch and a mining claim is peculiar. The rule of prior appropriation can not be strictly applied. The governing maxim is rather *sic utere tuo ut alienum non laedas*. And it may be doubted whether a ditch, although recognized as real estate, is to be regarded with the same favor by a court of equity.

Right of surface support. Whether the general rule giving to the surface of land the right to surface support applies to the care of a ditch. *Quaere*.

Appeal from the District Court of Placer County, Fourteenth Judicial District.

CHARLES A. TUTTLE, for appellants.

B. MYRES, for respondents.

By the Court, SANDERSON, J.

In the court below judgment passed for the defendants. The plaintiffs moved for a new trial, which was denied, and then appealed. The case comes here upon the pleadings, a bill of exceptions and a statement on motion for a new trial. The bill of exceptions does not relate to any question affecting the merits of the controversy, but to the power of the court below to go behind the license of an attorney and inquire as to his authority to appear for his client.

The bill shows that when the case was called for trial the defendants' attorney, appearing on behalf of one of the plaintiffs, Willis Jones, who was present in court, moved to discontinue the case as to him, and in support of the motion, presented an affidavit made by Jones to the effect that the action had been brought without his consent and against his will; that his name had been used without authority; that he was opposed to the prosecution of the action, and desired it to be discontinued as to him. This motion was resisted by counsel for the plaintiffs, who claimed that the court had no power in the premises. The court held otherwise, and ordered the

action to be discontinued so far as the plaintiff, Jones, was concerned.

Counsel for the appellants claim that this order was erroneous, and cite the case of the *Commissioners of the Funded Debt of the City of San Jose v. Younger*, 29 Cal. 147. That was a very different case. The commissioners had retained counsel to bring the action. A trial had been had, resulting in favor of the commissioners, and a new trial granted. At that stage of the case the commissioners, without substituting another attorney of record, and without the knowledge of their attorney of record, compromised the action, and authorized the attorney of defendant, in writing, to appear for them and dismiss the action, which he did; but the motion was resisted by the commissioners' attorney of record, upon the ground, among others, that he was still the attorney of record of the commissioners, and as such entitled to manage and control the case until displaced and another substituted of record. The court, nevertheless, dismissed the action, and this court reversed the judgment, holding in effect that where a party retains an attorney to bring or defend an action, the attorney has the right to control and manage the case until he has been superseded by another, in the manner dictated by the tenth section of the statute in relation to attorneys and counselors, which provides that an attorney in an action or special proceeding may be changed at any time before final judgment: First, upon his consent, filed with the clerk or entered upon the minutes; second, upon the order of the court or judge thereof, on the application of the client. The question there was, whether the court was bound to recognize the attorney of record as possessing the right to manage the case, or could at pleasure ignore him altogether, and recognize another as having that right. But the question here is, whether the court has the power to inquire as to the retainer of the attorney, upon the suggestion of the client that he has abused the license of the court, and brought the action without any authority. Upon such a question we have no doubt as to the power. Attorneys are the officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in its proceedings only by the license of the court, and if they under-

take to appear without authority from the party whom they profess to represent, the act is an abuse of the license of the court, which, upon the application of the supposed client, the court has the power to inquire into and correct summarily. Otherwise, the very fountain of justice might become polluted, and a license to stir its waters become a license to defile them.

An attorney's license is *prima facie* evidence of his authority to appear for any person whom he professes to represent, but if the supposed client denies his authority, the court may require him to produce the evidence of his retainer, under the supervisory power which it has over its process and the acts of its officers, and that, too, in the mode which was adopted in this case, as was suggested in *Turner v. Caruthers*, 17 Cal. 431.

It has also been held that the court may require an attorney to show special authority, upon the application of the opposite party, *when justice requires it*. *McKiernan et al. v. Patrick et al.*, was an action by McKiernan and Anderson, as the indorsees of two promissory notes. The defendants held a set-off as against McKiernan, and made a motion for an order upon the plaintiffs' attorneys to produce their authority for using the name of Anderson, which motion was supported by an affidavit to the effect that the notes in suit were the exclusive property of McKiernan, against whom they held a set-off; that Anderson was a myth, or if not, his name had been fraudulently used, without authority, for the purpose of avoiding the defendants' set-off as a defense to the action.

The plaintiffs' attorney showed cause, and informed the court that they received the notes from McKiernan, with instructions to sue as had been done; that they had had no communication with Anderson, and had no personal knowledge of him, but they understood that he was a friend and near neighbor of McKiernan in Alabama; that since the motion was made they had written to both of the plaintiffs for information, but had received no answers. The court denied the defendants' motion. Subsequently, judgment passed for the plaintiffs and the defendants appealed, and specified as error the overruling of their motion for a rule upon the

plaintiffs' attorneys to show by what authority they prosecuted the suit in the name of Anderson; and the appellate court reversed the judgment, with instructions to re-try the rule, and if the plaintiffs' attorneys failed to produce satisfactory authority for bringing the action in the name of Anderson, to dismiss it: 4 How. (Miss.) 333.

It is proper to say, in conclusion, that we impute no misconduct to counsel for the plaintiffs in this case. Their character and standing at the bar is sufficient assurance that they did not abuse their license. It frequently happens that counsel are employed by parties acting for themselves and their associates. If, as in this instance, it turns out subsequently that some of them were opposed to suing and desired to discontinue, no blame can attach to counsel.

We now come to the merits of the case. The only relief sought by the plaintiffs is an injunction. They allege that they are the owners of a ditch, such as is used in the mineral regions of this State for the conveyance of water for mining purposes, of a capacity sufficient to carry four hundred and fifty inches of water; that the ditch has heretofore, and will hereafter, if not destroyed, yield them net profits to the amount of many thousand dollars yearly; that said ditch extends along the side of a steep mountain, of from one to two thousand feet in height, and that the mountain, at a point about five miles below the head of the ditch, is composed of earth and gravel to the depth of from fifty to one hundred feet beneath the surface; that said earth and ground is easily washed and dug away, and that if an excavation is made below the ditch and within a distance of fifty feet, it is liable to cause a slide which will destroy the ditch; that the defendants are in possession of a mining claim at the point designated, extending from a point below the plaintiffs' ditch across the line of the ditch, and back into the mountain a distance of more than a thousand feet; that the claim is about one hundred and fifty feet in width; that the defendants have sluiced away the earth and gravel below the ditch to a point within fifteen feet of it, so as to leave a perpendicular bank about one hundred feet in height, which has caused the ground under and near the ditch to crack, and that there is great danger that the earth will slide and carry away the

ditch; that the defendants have also run tunnels and drifts into their claim at a point about one hundred feet below the plaintiffs' ditch, perpendicular measurement, and by means thereof have caused the surface of the earth over which the ditch extends to settle and crack, so that in the winter and spring of 1866-67 the water would not flow in the ditch, but escaped through said cracks and fissures, and in consequence thereof a flume had to be constructed across defendants' claim, as a substitute for the ditch; that the tunnels and drifts of the defendants are about six feet in height; that the defendants are still tunneling and drifting, and threaten to tunnel and drift hereafter; that the work already done will probably cause the bank to settle and slide off during the coming wet season, to the destruction of the plaintiffs' ditch, and if the defendants continue their work the ditch will certainly be destroyed, and the plaintiffs will no longer be able to realize any profit therefrom. It is also alleged that the plaintiffs' right of way is older than the mining right of the defendants. There is no allegation that the defendants are not working their mine in the usual or customary mode, or that they have neglected or are neglecting to place under the superincumbent earth sufficient supports to maintain the surface in its natural position.

The defendants demurred to the complaint, on the grounds of insufficiency and ambiguity. The demurrer was overruled, and they then answered, admitting that the plaintiffs' ditch was older than their claim, but denying that the capacity of the ditch was sufficient to carry more than eighty-five inches of water, or that the mountain was composed of earth and gravel to a depth of more than twenty feet, and alleging that next underneath the ground came hard rock—cement. That their tunnels and drifts are not less than one hundred and sixty feet, perpendicular measurement, below the plaintiffs' ditch; and they deny that the cracks and fissures came in consequence of their tunnels and drifts. They also deny that they sluiced within less than thirty-five feet of the ditch, or that their sluicing has injured, or will injure the ditch; and they allege that no sluicing has been done since more than two years prior to the commencement of this action, and that, if it caused any damage to the plaintiffs, the dam-

age was accomplished long before the suit was brought. They also allege that the only paying part of their claim, and the only part they intend to work, lies at a depth of not less than one hundred and sixty feet below the surface, and that as they advance into the bowels of the mountain, the depth will increase. That they have already advanced beyond the perpendicular plane of the plaintiffs' ditch at least twenty feet, and that the work they are now doing, and intend to do, can not possibly destroy or injure the plaintiffs' ditch. While they deny that their work caused the cracks and fissures in question, they allege that they, at the request of the plaintiffs, constructed a flume across their claim, which has since carried, and still does carry, all the water of the ditch without loss. They lastly deny the value of the profits of the ditch, and allege that the destruction of the ditch would cause no irreparable injury to the plaintiffs.

At the trial two exceptions were taken by the appellants to the ruling of the court, rejecting testimony offered by them: 1st, as to the profits realized by them from certain mining claims which they owned and worked with water from their ditch at a point below the defendants' claim; and 2d, as to the effect of tunneling and drifting upon the surface of the ground at a point below the defendants' claim, where, as alleged, the formation and composition of the earth was similar to the formation and composition of the earth at the defendants' claim, and where, as claimed by them, the effect of tunneling and drifting had been to cause the surface of the earth to settle, crack and cave.

The only issue to which the first could be relevant was as to the value of the ditch. Testimony as to the value of their claim could not, as we perceive, tend to establish the value of the ditch, unless accompanied by further evidence showing that the claim could not be worked without the aid of the ditch. It was not proposed to prove that the water conveyed in the ditch was the only available water for working the claim. In the absence of some such special reason as that suggested, we think the value of the ditch, if material, should have been proved in the ordinary way, by showing its capacity, the value of water for mining purposes in the vicinity, and the probable duration of the demand. That mode of

proof was unaffected by the fact that the plaintiffs used the whole or a part of the water themselves. Its market value would have been its value to them also.

We also think the testimony in relation to the effect of tunneling and drifting in another but similar locality was properly rejected. The cause of the settling and cracking of the surface of the earth under the circumstances of this case is matter of opinion rather than direct and positive testimony. The proper course in such cases is to take the opinion of witnesses who have examined the premises, and are qualified by learning, observation and experience, to judge intelligently of the cause. While the opinions of such witnesses may be founded mainly upon their observation and experience in other like cases, it is well settled that they can not, on the direct examination, be questioned as to particular instances. The reason of this rule is obvious. Different witnesses might have different theories. Their opinions might be founded upon the observance of several and distinct instances. If allowed to adduce one, they may adduce all. The opposite party would have a legal right to controvert each particular case mentioned by the witnesses, and yet be unable to avail himself of the right because of his inability to anticipate the cases mentioned and prepare for their investigation. Moreover, such a course in addition to the objection just mentioned would lead to innumerable side issues, and render the trial of a cause interminable, distractive, and enormously expensive: 1 Greenl. on Ev., Sec. 448; *Central Pacific R. R. Co. of California v. Pearson*, 35 Cal. 247.

The remaining point made by the appellants is, that the evidence made a case for an injunction, and therefore the court below erred in denying it. The testimony bearing directly upon this point is not voluminous, and we will therefore refer to it.

Davidson, a surveyor, testified that the earth under the ditch is composed of gravel and cement; that twenty feet of the top is cement; that there is a tunnel running from the bank under the plaintiffs' ditch; that he went into the tunnel, and found that the ground under the ditch, and in front of it, had been drifted out; that the drifts were about six feet in height; that the tunnel and drifts are one hundred and

sixty feet lower than the ditch, perpendicular measurement; that he found one cave in the drift of several feet in length; that the drifting had a tendency to weaken the subjacent support of the surface. This witness also testified that the sluicing off of the earth in front of the ditch, which, as the case shows, was done some two years and a half prior to the commencement of the action, also had a tendency to weaken the lateral and subjacent support which the ground affords to the ditch.

Anthony Clark, one of the plaintiffs, testified that the ground first cracked in March, 1867, which, as the case shows, was two years after the sluicing had been discontinued, and some six months before the commencement of the action; that the cracks were large enough to swallow all the water of the ditch; that he called the attention of the defendants to the cracks, and told them that he thought they ought to put in a flume, which they (the defendants) did; that the flume, when in, carried the water over the cracks; that the ground cracked again in the following April; that Ford, one of the defendants, called his attention to it, and asked him to turn off the water so that they could put in more flume, which was done. As to the formation of the earth, and the effect upon its surface of the defendants' sluicing, tunneling, and drifting, he testified substantially the same as the witness Davidson. He also testified that "the ditch would be destroyed *anyway* by the work which the defendants had done before the action was commenced;" that the surface of the earth has settled some five or six inches, and the ditch can not now be used, except in connection with the flume.

Willard, the ditch agent of the plaintiffs, testified as to the cracks and settling of the surface substantially the same as the last witness, and that he knew of no cause for it except the doings of the defendants.

Upon the foregoing testimony, so far as the effect of the defendants' work upon the ditch is concerned, the plaintiffs rested their case. It is to be observed, at this place, that the plaintiffs neither alleged in their complaint, nor attempted to show by their testimony, either that the defendants had not or were not conducting their mining operations in the usual and customary mode, and with ordinary and reasonable care and skill.

Willetts, one of the defendants, testified and admitted, in effect, that the mining operations of the defendants had probably caused the settling and cracking of the surface, but that they had built a flume in place of the ditch, which answered every purpose equally as well as the ditch, with which the plaintiffs seemed satisfied at the time. That the ground they were working at the time the action was on trial, and the only ground which they expected to work thereafter, was on a horizontal plane one hundred and sixty feet below that of the plaintiffs' ditch, and from thirty to forty feet farther into the bowels of the mountain than the perpendicular plane of the ditch. That, in his opinion, the work being done and to be done will not injure the plaintiffs' ditch, but that, should it result in a slide and the destruction of the ditch, the water could be easily carried across their claim in an iron or hose pipe, and that they (the defendants) would have it to do, because they could not work their mine without conducting the water across it. That the defendants are solvent, and have expended thirty or forty thousand dollars in working their claim, which is rich in gold, and worth from fifty to sixty thousand dollars.

Earl, whose testimony was more favorable to the plaintiffs than the defendants, by whom he was called, testified that drifting further back would cause the bank to cave, giving as the reason for his belief that the air will cause gravel and cement to slack.

Jones testified, in substance, that further work by the defendants, in the manner proposed, could not injure the ditch; that the defendants were doing their work carefully, and filling up as they advanced, leaving the earth about as solid as it was before; that if the ditch should give way there would be no difficulty in conveying water across the claim in a flume, as now, or by an iron or hose pipe; that the water now runs in the flume as well as it did in the ditch; that all the work which can injure the ditch was done long before the suit was commenced.

Willis Jones, the plaintiff in whose behalf the court had discontinued the case, testified to the same effect as the last witness.

The foregoing is, in substance, all the testimony bearing

upon the point before us. No finding of facts was made by the judge below, and we must therefore presume that he found all the issues against the plaintiffs. The question then is did he find any of the material issues contrary to the evidence? Into that question we can look no further than to see whether there is a substantial conflict. If there is, we must affirm the judgment. If there is not, and the evidence is against the judgment, we may reverse it and grant a new trial. Such is the rule of this court, and in respect to its application there is no distinction between cases in equity and cases at law.

The only material issue, as we consider, in view of the relief sought, which is an injunction upon further work by the defendants without damages for past injuries, is whether such work, if allowed to go on, will irreparably injure the plaintiffs' ditch; for, assuming that the injury which the ditch has already sustained was caused by the mining of the defendants, the act has already transpired, and is therefore past prevention. As to the effect of the work which they are now doing and propose to do, the testimony is not only conflicting, but its weight is against the theory of the plaintiffs. But were it otherwise, an injunction would hardly be granted, if it be true, as stated in the complaint, that the work already done will probably cause the destruction of the ditch, and especially if it be true, as stated by the plaintiff Clark while on the witness stand, that "the ditch will be destroyed *anyway* by the work which was done before the suit was commenced." If the destruction of the ditch be inevitable, as Clark seems to think, irrespective of future work, we are unable to perceive how, by preventing the work, the ditch can be saved from destruction. If the destruction must come "*anyway*," we are unable to perceive how even a court of equity can prevent it. Assuming, then, that an injunction would have been allowed if it had been applied for at the time the work of defendants first threatened injury to the ditch, we think it clear that the plaintiffs have delayed their application until it is too late. So far as we can judge, an injunction would be ruinous to the defendants and of no benefit to the plaintiffs.

What we have said disposes of the case, but we desire to add, in conclusion, that we do not wish to be understood from

the manner in which we have treated it, as implying that an injunction would under any circumstances be allowed in this case. Upon that point we express no opinion. The relative situations and rights of the parties are peculiar. While the plaintiffs have a right of way for their ditch upon the surface, the defendants have also a right to mine in the bowels of the mountain. Such rights are not necessarily incompatible, and we do not, therefore, consider that the maxim *Qui prior est tempore, potior est jure*, is of controlling weight. On the contrary, the case would seem to fall under the maxim *Sic utere tuo ut alienum non lædas*. How far a court of equity will interfere, if at all, where such are the conditions and no negligence is charged, as in this case, it is unnecessary to consider. The general rule undoubtedly is, that a party in possession of the surface of land is entitled to the lateral support which the adjacent soil affords, and the perpendicular support which is afforded by the subjacent strata. But how far that principle will be enforced when, as here, the surface is used merely for the purpose of a ditch in which to carry water for the purpose of trade and traffic, which possibly can be carried just as well in some other way, with but a trifling additional expense and without any detriment to the trade in water, has not, so far as we are advised, been determined. Whether ditch property in the mineral regions of this State, although conceded to be real estate, used as it is for the purposes of trade and commerce, is to be regarded by courts of equity with the same measure of favor which is bestowed by them upon land which is held and cherished by the owner for *itself*, and not merely put to use for an ulterior object, admits at least of serious doubt. Such ditches are more or less temporary. They are not valuable *as land*. Their value depends entirely upon the demand for water, and when the demand has ceased they become worthless. The qualities upon which the common law grounds its peculiar fondness for land, and the reasons why courts of equity will interfere to protect it, would, therefore, seem to be measurably wanting. See the case of *Humphries v. Brogden*, 12 Queen's Bench, 739; and *Gibson v. Puchta*, 33 Cal. 316.

Judgment affirmed, and remittitur directed to issue forthwith.

'THE OPHIR SILVER MINING CO. V. CARPENTER ET AL.

(4 Nevada, 534. Supreme Court, 1868.)

Insufficient diligence in constructing ditch lets in intervenors. Defendants grantor, in 1858, constructed a ditch from the Carson river to Dayton, a distance of four and one half miles; in 1859 and 1860 plaintiff's grantors tapped the river below the head of the Dayton ditch; in 1864 the Dayton ditch was finally enlarged to much greater capacity and so as to interfere with the supply to plaintiff's ditch—this enlargement of the Dayton ditch, having been contemplated since 1858, but the work not prosecuted with diligence between 1858 and the time when the rights of the plaintiff's grantors accrued: *Held*, that the plaintiff's ditch had the appropriation prior to the enlarged ditch.

Facts not amounting to reasonable diligence. The cleaning of the old ditch in 1859, with the enlargements in places, but not so as to increase the capacity of the ditch to any greater scale, no labor toward enlargement in 1860, but little except repairs in 1861 and 1862 and no definite effort to increase the capacity of the ditch, with expenditures commensurate to the undertaking until 1863 and 1864, was not sufficient diligence to hold the ditch as enlarged against an undertaking which had been vigorously prosecuted shortly after the completion of the original ditch.

Date of appropriation. Where the work of appropriation is not prosecuted with diligence, although finally completed, the appropriation is dated from the completion, and not from the original commencement of the enterprise.

Relation. Priority of appropriation gives the better right to the use of running water when the right itself springs from appropriation and not as an incident of ownership of the soil; and where labor is required to complete the appropriation a reasonable time is allowed for such labor, and if completed within such reasonable time the appropriation is considered as relating back to the first act done by the locator.

Sickness and want of means no excuse for delay. In considering the question of reasonable diligence upon enterprises requiring much labor and capital, the illness of the principal operator, or his want of pecuniary means, and such other accidents causing delay as are incident to the person and not to the enterprise, can not be taken as an excuse to prolong the time which should be allowed.

² Due diligence defined. To constitute diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises who desire a speedy accomplishment of their designs; such assiduity as shows a *bona fide* intention to complete it within a reasonable time.

Verdict set aside—Want of diligence. Due diligence is a question for the jury, but the term is sufficiently well defined to justify a court in setting the verdict aside, when, upon an admitted state of facts, there appears an utter want of diligence.

¹ *Same v. Same*, 4 M. R. 653.

² *Highland Ditch Co. v. Mumford*, 2 M. R. 3.

OPHIR SILVER MINING CO. V. CARPENTER. 641

¹ **Practice—Injunction after verdict upon legal issues.** In a suit in which equitable relief is sought by injunction, but which is entirely dependent upon the legal issues, the parties have a right to claim a jury to determine all the legal issues, and an injunction can only be granted when the verdict of the jury is in his favor who claims such equitable relief.

Appeal from the District Court of Storey County, First Judicial District.

C. J. HILLYER, and THOMAS H. WILLIAMS for appellant, the plaintiff below.

ALDRICH & DE LONG, for respondents.

By the Court, LEWIS, C. J.

This action is founded upon an alleged unlawful diversion of water, whereby it is claimed the plaintiff was damaged in the sum of \$3,000, for which judgment is asked against the defendants. An injunction is also prayed for to restrain any future diversion. The defendants claim the right to divert the full quantity of water taken by them, by reason of an appropriation prior in point of time to any claim or appropriation by the plaintiff. And thus this controversy may be determined upon its merits by the resolution of the question which of the parties made the first appropriation of the water diverted by the defendants. We have carefully examined the voluminous record in the case for the purpose of determining this main question, and as our conclusions are in favor of the plaintiff, the consideration of any minor questions is rendered unnecessary. We concede for the purposes of the present discussion (although it is a fact by no means beyond doubt) that the grantors of the defendants made claim to and intended to appropriate the full volume of water now claimed by them, long prior to the time when the plaintiff's grantors appropriated what is claimed by it, and place our decision entirely upon the failure on the part of those from whom defendants derive their title, to prosecute their claim to consummation with that diligence which is necessary when it is attempted to make the final act of appropriation relate to the time when the first step was taken, or the first act done, to make it. We propose to rely solely upon the undisputed facts and uncontradicted evi-

¹ *Emma Mine Case, Post INJUNCTION.*

dence to support the conclusion at which we have arrived, the substance of which may be thus stated: In the spring of the year 1858, J. H. Rose, the grantor of defendants, desiring to convey water to the village of Dayton from the Carson river, constructed for that purpose a ditch about four and a half miles in length, and of dimensions varying at different points. At its immediate head it was sixteen feet wide. For a distance of one fourth of a mile below it averaged seven and one half feet wide on top, and two and one half feet deep. Its general size below that point was three and one half feet wide at the top, two and one half feet on the bottom, and two and one half feet deep. The ditch was thus constructed in the year 1858. In the following year water was run through it to Dayton, and it remained pretty much in this condition until the fall of the year 1862, at which time Rose entered into a contract with Shanklin and McConnell for its enlargement to its present capacity. Work was immediately commenced under that contract, and the present ditch completed early in 1865. Under this contract an entirely new survey was made, and the water was taken from the river at a point one quarter of a mile above the head of the old ditch, and on the opposite side of the river. The size of this new ditch, which is called the Shanklin and McConnell ditch, is thirteen feet in width at the top, nine feet on the bottom, and four feet deep. Its flumes are six feet by three, with a fall of one-fifth of an inch to the rod. The volume of water which can be run through it is ten times greater than could have been run through the old Rose ditch, its capacity being fifty-seven cubic feet per second, while the old ditch was capable of discharging only about four and a half feet. The grantors of the plaintiff made no claim to any water until the month of July, A. D. 1859. In that year they diverted the water from the river at a point some distance below the head of the Rose ditch, used some quantity of it that year, and in the fall of 1860 completed their ditch to its present capacity; and have ever since used the water thus diverted for motive power. The defendants claim that the ditch as constructed or enlarged by Shanklin and McConnell is in accordance with the original design of Rose, from whom they acquire their right; that such design was manifested by the fact that his first ditch

was of as great capacity for a quarter of a mile from its head as the present ditch, and hence that their right to the entire volume of water which the present ditch will carry must relate to the time when Rose did the first act toward appropriating it, which was in the spring of the year 1858. The plaintiff concedes that the defendants, as the first appropriators, have the right: First. To divert through their ditch so much of the water of the river as would have run through the old ditch. It is then claimed that the plaintiff is entitled to sufficient water to fill its ditch, counsel arguing on its behalf that the grantors of defendants had no right to increase the capacity of the old ditch to its prejudice. Where the right to the use of running water is based upon appropriation, and not upon an ownership in the soil, it is the generally recognized rule here that priority of appropriation gives the superior right. When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it. If, however, the work be not prosecuted with diligence, the right does not so relate, but generally dates from the time when the work is completed or the appropriation is fully perfected.

As we have already stated, we concede the fact, for the present, that Rose designed, when he constructed his ditch in the year 1858, to enlarge it to the capacity of the present ditch, and if he has shown that the design thus conceived was prosecuted with a reasonable degree of diligence until its completion, then the defendant's right to that quantity of water now claimed by them will relate back to the spring of 1858, and thus antedate the plaintiffs' right eighteen months or two years, thereby giving them the superior right. But in our opinion the evidence shows an utter failure on the part of Rose to prosecute his original design with that diligence which the law requires. The manner in which this work was prosecuted we gather from the testimony of Rose himself. In the year 1858 the ditch was constructed, and a great deal of work was necessarily done. In the succeeding year also a considerable

amount of work was done in cleaning out the ditch and enlarging it in some places. Some time in the summer of this year the ditch was completed to such an extent that a small quantity of water was run through it to Dayton. It is very doubtful whether any work was done this year toward a systematic enlargement of the ditch for the purpose of increasing its general capacity. Rose himself thus describes the work done: "I was trying to get more water through; so wherever earth or rock slid in from the sides of the ditch, all the men hired by the day were instructed to dig or throw it out, and to throw out all the loose dirt or gravel that was not worked out by the water running through." However this may be, it is certain that in the succeeding year, that is in 1860, nothing whatever was done toward enlargement. Indeed, the only thing done during the entire year was the employment of two men, who were engaged for a few days in throwing out rock from the ditch. This is all the work that was done between the fall of 1859 and the month of May, A. D. 1861, a period of more than eighteen months. As counsel for appellant very aptly remarked, "Rose during this time gave to other pursuits his time and industry, and to the vast enterprise of securing all the waters of the Carson river only a diligent contemplation." The year 1861 is little less barren of results. A few men were employed for a period of three months only, who, Rose says, were engaged in cleaning out and enlarging the ditch. From the fall of 1861 to the summer of 1862 nothing appears to have been done. In the summer from three to twenty men were employed, and continued work for about five months. But it is not pretended that they were employed at enlarging, but only cleaning out the ditch. Rose testifies that he did not know that it was enlarged at all that year; that the heavy rains during the winter had filled it up in many places; that he had it all cleaned out. In September of this year the contract between Rose and Shanklin and McConnell was entered into, and during the years 1863 and 1864 the work progressed, and the present ditch of the defendants was completed. Thus, it appears, that from the fall of 1859 to the summer of 1862, a period of over two years and a half, work was done upon the ditch for about three months only; that was during the year 1861, when Rose tes-

tifies that from seventeen to twenty men were employed. During this period of inactivity on the part of Rose, the grantors of the plaintiff prosecuted their work vigorously and finished their ditch to its present capacity in the year 1860. These facts, it is argued on behalf of defendants, show such diligence on the part of their grantor in the prosecution of his original design as to make their right to the quantity of water now diverted by them relate to the time when Rose, in the year 1858, did the first act toward appropriation. We are constrained to differ from counsel upon this proposition.

In our judgment those facts exhibit an utter want of diligence in the prosecution of the design which it is claimed was undertaken by Rose. If the labor of twenty men for three or four months, in a period of two years and a half, constitutes diligence in the prosecution of such a vast enterprise as this, it is difficult, if not impossible, to designate the entire want of diligence. The manner in which this work was prosecuted certainly does not accord with what is generally understood to be reasonable diligence. Diligence is defined to be the "steady application to business of any kind, constant effort to accomplish any undertaking." The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself. The law, then, required the grantors of the defendants to prosecute the work necessary to an execution of the design with all practical expedition. But the evidence clearly shows that this was not done. The ditch was of the same general size, and the flumes of the same capacity, at the time when Shanklin and McConnell commenced work, as they were in the spring of 1859. As no great effort is made necessary, so no unreasonable dilatoriness or delay is tolerated. But it is unnecessary for us to determine what would be deemed reasonable diligence on the

part of the grantors of the defendants in this case; it is enough to say that the doing of five or six days work during a period of sixteen months, that is from the fall of 1859 to the month of May, 1861, and only three months labor during a period of two years and a half, does not exhibit that diligence which the law requires. The weather would not have prevented work upon this ditch ordinarily more than three or four months in the year, hence labor upon it could probably have been prosecuted during eight or nine months out of every twelve. Here, however, there was a period of thirty months, when only about three months work was done, or one month out of every ten. Rose during this time may have dreamed of his canal completed, seen it, with his mind's eye, yielding him a great revenue; he may have indulged the hope of providential interposition in his favor; but this can not be called a diligent prosecution of his enterprise. Surely he could hardly have expected to complete it during his natural life by such efforts as were made through this period.

It is, however, claimed on behalf of the defendants that all the work was done at this time which under the circumstances could be done, and that the law requires no more. Rose's illness for a short time early in the year 1860, his want of means, and considerations of economy, are suggested as circumstances to be considered in determining whether the enterprise was prosecuted with reasonable diligence. Rose testifies that in the spring of the year 1860 he was sick. But it is not shown that that should necessarily interfere with the prosecution of the work. For aught that appears in the record it could have proceeded notwithstanding his illness. If it were admitted, however, that his illness constituted a valid excuse for a want of diligence, it would only excuse it while such illness continued, which was only for a short time in the early part of 1860. But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at all. Like the pecuniary condition of a person, it is not one of those matters incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers.

or something of that character. It would be a most dangerous doctrine to hold that ill-health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time or the diligence which is usually required in the prosecution of the work necessary for the purpose. We find no recognition of such doctrine in the law. Nor are we disposed to adopt it as the rule to govern cases of this kind. There is nothing, therefore, in the voluminous record brought before us which in any wise tends to excuse the inactivity and want of effort displayed during the two years and a half we have referred to. Nothing to show that the work of enlarging the ditch could not have been systematically prosecuted during the greater part of every year, or that there was any difficulty in getting laborers.

We conclude, therefore, that Rose and his associates did not prosecute the work upon their ditch with that diligence which the law required, and so their right to any quantity of water, beyond what could be taken through the old ditch, is subordinate and subject to the rights of the plaintiff.

It is, however, contended that the verdict of the jury upon this point is conclusive. And as it found that the work was prosecuted with due diligence, the court, it is argued, must be controlled by that finding. The general power of an appellate court to set aside the verdict of a jury when it is not warranted by the evidence, is not, we presume, denied by respondent, but it is argued no such verdict should be disturbed when no other objection is made to it, if upon any rational view of the evidence it can be supported. To this qualification we heartily assent, believing it to be the correct rule, and one founded upon most excellent reason. The jury and judge at *nisi prius* generally have better means of arriving at correct conclusions upon matters of fact than the appellate court has. They have the opportunity of observing the general bearing of the witnesses and the manner in which they testify, and are better able to determine what degree of weight should be given to the testimony of each particular witness than the appellate court. So, too, evidence is sometimes of a character which can not well be presented in a record, or at best but imperfectly. It behooves the appellate court, in view of the disadvantages which it must neces-

sarily labor under in passing upon the weight of testimony, to give great consideration to the verdict of the jury upon it, and this the courts are generally disposed to do: *State v. Yellow Jacket Co.*, 5 Nev. 415.

If, therefore, there be any evidence of a substantial character to support the verdict, the better opinion, we think, is that it should not be disturbed, simply because the weight of evidence appears to be against it. However, if there be no substantial evidence upon the side of the verdict, it is the undoubted duty of the appellate court to set it aside. In our opinion, the record in this case presents just such a case. The testimony on behalf of the defendants, without any weight being given to that of the plaintiff, not only fails to show that their grantors prosecuted the work on their ditch with reasonable diligence, but on the contrary shows affirmatively that they did not. There is no dispute whatever as to the amount of work done during the time to which we have referred. Indeed, the testimony of the defendants' grantors is accepted as correct in that respect. It must be conceded that in the ordinary course of things work of the character required could have been carried on during the greater part of every year. But by the defendants' own evidence, it is shown that for one entire year nothing of any consequence was done, and for a period of two years and a half the work on this great project was carried on only for about three months, and no excuse which can be recognized by the law is offered for this inactivity. These are facts which are not denied by the defendants. Such being the case, it is only necessary for this court to decide whether these undisputed facts show that diligence on the part of the grantors of the defendants in the prosecution of the work on this old ditch which the law required of them.

There is no evidence to weigh. Nothing to be done but to decide whether all that is claimed to have been done by the grantor of defendants meets the requirements of the law. If it is perfectly apparent that it does not, why should not the verdict of the jury finding otherwise be set aside, as a verdict in any other case which is totally unsupported by the evidence? We see no reason why the verdict of a jury should be any more conclusive upon the question of due diligence

than it is upon any other fact. Due diligence is sufficiently clearly defined to enable the courts to determine whether any given state of facts is sufficient to constitute it or not. Whether it has been shown or not is certainly not a matter to be finally determined by the arbitrary assumption or conclusion of a jury in every particular case. If so, and the courts have nothing definite and fixed by which the correctness of such assumption or conclusion may be tested, then the verdict of a jury upon the question of diligence must in every case be absolutely final, even if it involved an evident and bald absurdity. If they found due diligence to have been exercised when absolutely nothing was done, or that it was not exercised when everything possible was done, litigants could not be relieved from such a finding. But, as we have already stated, we think a verdict upon the question of diligence may, like the verdict upon any other question, be set aside if unsupported or unwarranted by the evidence. The undisputed evidence in this case shows an utter want of diligence on the side of the defendants. The finding to the contrary must, therefore, be set aside.

The equitable relief sought in this case is ancillary to and entirely dependent upon the legal issues. A final injunction should not be granted until it is determined that the defendants diverted more water than they had a right to, and that by reason of such diversion the plaintiff was deprived of the quantity to which it was entitled. These are facts, however, to determine which the parties have a right to claim a jury. As it was necessary under the old practice to have the title or legal right settled by the law court before an injunction would issue, so here, although the entire relief, legal and equitable, is sought in one action, still the parties have the right to claim a jury to determine all the legal issues, and an injunction can only be granted when the verdict of the jury is in his favor who claims such equitable relief. As there are issues involved in this case which must be passed upon by a jury before the final injunction can properly issue, we can not direct the court below to issue such injunction, but must order a new trial.

It is so ordered.

WHITMAN, J., did not participate in the foregoing decision.

NOTEWARE ET AL. V. STERNS.

(1 Montana, 311. Supreme Court, 1871.)

Agreed statement—Practice. An agreed statement of facts on which the case was tried in the lower court, but which is not included in the statement on appeal, nor in the bill of exceptions, nor certified by the judge as having been used on the trial, forms no part of the record, and will not be considered on appeal.

¹ **Act of Congress of 1866—Location over mining claim—Compensation.** Section 9 of the Mining Act of Congress of 1866 (Rev. Stat. § 2339) does not authorize the construction of a ditch over the mining ground of another, to the partial or total destruction of his property, without showing a necessity therefor, and paying or securing the damages. It grants the right of way to ditch owners, but not to the exclusion of other rights granted under the same law.

Appeal from the First District, Madison County. The opinion states the facts.

W. F. SANDERS and H. N. BLAKE, for appellants, who were plaintiffs below.

WORD & SPRATT, for respondent.

SYMES, J.

This was an action for damages and a perpetual injunction, for filling up and injuring the water ditch of plaintiffs. The complaint alleged, in substance, that plaintiffs were the owners of a certain water ditch in Alder gulch, and dams and reservoirs; that, for the purpose of running the water of said ditch to their mining ground, they commenced the construction of an additional ditch; that, in order to run said ditch to their mining ground, it was necessary to construct the same across the mining ground of defendant; that they went upon defendant's ground and constructed some portion of their ditch, when they were prevented from further constructing said ditch, and the defendant filled up the same; and plaintiffs ask judgment for damages, and that defendant be restrained perpetually from interfering with plaintiffs constructing their ditch through or over defendant's mining ground.

¹ *Titcomb v. Kirk*, 4 M. R. 10; See *Hobart v. Ford*, 6 Nev. 77; *Post WAY*.

Defendant answered, and admitted plaintiffs' ownership of ditch and water right; alleged that he was the owner of 450 feet of mining ground below plaintiffs' dam and reservoir; that it was worth \$2,000, and he had been the owner thereof since 1863; admitted that plaintiffs went on his ground and attempted to dig a ditch, without his consent, and that he filled up said ditch; denied that he interfered with plaintiffs' ditch, except on his own ground; further answering, alleged that the construction of said ditch over or through his mining ground would produce great and irreparable injury to the same, and render it wholly worthless; and that it was not necessary for plaintiffs to construct said ditch across his ground to enable them to save and conduct their surplus water to their mining ground; that constructing said ditch across his ground would deprive him of the use of the waters of Alder gulch for mining, to which he is entitled; denied irreparable injury, insolvency and damage, and asked judgment for costs.

Plaintiffs replied, but as no replication was necessary it is unnecessary to notice it.

The case was tried before the court below on an agreed statement of facts, and judgment of nonsuit rendered against the plaintiffs, an appeal taken from the judgment roll, no bill of exceptions, or statement on appeal, appearing in the record.

There appears, in the transcript, an agreed statement of facts, on which the case seems to have been tried. This agreed statement of facts not being included in a statement on appeal, and settled or agreed to in accordance with section 323 of the Civil Code, nor saved nor included in a bill of exceptions, nor designated or referred to as having been used on the trial by a certificate of the judge, it forms no part of the record which we can consider on appeal.

Then the only questions presented are, did the court below err in rendering judgment of nonsuit on the pleadings and facts found by the court? The court found that defendant was the owner of the mining ground, over and through which plaintiffs attempted, without consent of defendant, to construct their ditch; that the construction of said ditch would greatly injure and damage defendant, and, to a great extent, deprive him of the use of his mining ground, and the waters of Alder gulch running over and through the

same; that defendant and his grantors had located and possessed said property since the year 1863, and had prior and superior rights to the same and the enjoyment thereof; that the plaintiffs had not paid, or offered to pay, the said defendant for any damage he had or would sustain by reason of the construction of the said ditch over his mining ground; and that defendant was not guilty of wrongs and trespasses alleged against him in plaintiffs' complaint.

It is contended by plaintiffs below that, under the act of Congress entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26, 1866 (14 U. S. Stat. at Large, 253, § 9), the plaintiffs had the legal right to go on the defendant's mining ground, and construct their ditch over, through and across the same, without the consent of the defendant; and that, because the defendant prevented them from so doing, and filled up that portion of the ditch on his ground, plaintiffs are entitled to a judgment for damages and a perpetual injunction. So far as our information goes, section 9 of the act of Congress mentioned has never received any judicial construction; and the record in this case does not call upon us to construe it so fully as to present those original and interesting questions which must eventually arise under this law. We do not think it was the intention of Congress, when it said that the right of way for the construction of ditches and canals over the public domain, for carrying water for mining and other purposes, is acknowledged and confirmed to those who, by the local laws and customs, have vested rights therein, to enact that one person may go at his pleasure on the mining ground of another, without the latter's consent, and construct through or over the same a ditch or canal, which would greatly damage or almost destroy the vested rights of the owner, without showing a necessity therefor, and paying or securing the damage to result therefrom.

The findings of the court show this to be about the state of circumstances under which the plaintiffs ask the court to perpetually enjoin the defendant from interfering, in any way, to prevent the construction of their ditch through his property; and there was no error in the judgment of the court below.

We think it was the intention of Congress to give the right

of way over the public domain to those owning water rights, for the construction of ditches and canals, to make the same available for useful and beneficial purposes; but what degree of necessity must exist to give the right to construct a ditch or canal over or through land or mining ground possessed by another, in which valuable vested rights have accrued under the same law, to the partial or total destruction of those rights, when and how the damages resulting from the construction of such ditch or canal must be paid or secured, and, in case of the owner's refusing and preventing the digging of the ditch on ground lawfully possessed by him, the proper mode of procedure to enforce the rights given by said law of Congress, are questions not presented in this case.

Judgment affirmed.

¹ OPHIR SILVER MINING CO. V. CARPENTER ET AL.

(6 Nevada, 393. Supreme Court, 1871.)

Measurement of water appropriated. The quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at its smallest point; that is, at the point where the least water can be carried through it.

Findings as to capacity of ditch. Where a finding as to the capacity of a ditch is based upon its being of a certain size and grade, and though its size is proved there is no sufficient proof of its grade: *Held*, that the finding should be set aside and a new trial granted.

Idem—New issues in Supreme Court. In a controversy as to the amount of water appropriated both parties conceded that it should be measured by the capacity of a certain flume at a certain point: *Held*, that the investigation in the Supreme Court should be confined to the same section of the flume, in reviewing the finding as to its capacity.

Appeal from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

BEATTY & DENSON, for appellants.

WILLIAMS & BIXLER, for respondent.

¹ *Same v. Same*, 4 M. R. 640.

By the Court, LEWIS, C. J.

In the years 1858 and 1859, one J. H. Rose appropriated a certain quantity of water from the Carson river, by diverting the same for mining purposes, to be used some four miles below the point of diversion. The water thus diverted was conducted to the locality where it was used, by means of a ditch and flumes. In the year 1860, the grantors of the respondent also appropriated water from the river, diverting it at a point below the head of the Rose ditch, and using it as motive power for a quartz mill. In the winter of 1861, this ditch was improved and enlarged; and again it is claimed by appellants that it was very much enlarged in the year 1865—a fact important to be determined in the case, for the reason that in the year 1862, the Rose ditch was also greatly enlarged; hence, although admitted that these appellants, as the successors of Rose, are first entitled to the full quantity of water appropriated by him in the year 1859, it is also admitted that after the appellants have received that, the respondent is entitled to so much as was appropriated by it, before the appellants can further claim the additional quantity appropriated by them in the year 1862, by the enlargement of the old Rose ditch. Thus it became necessary in the court below to ascertain first, the capacity of the Rose ditch as constructed in the year 1859; and secondly, the capacity of the respondent's ditch, and whether it was enlarged in the year 1865, and if so, to what extent. There is no controversy between counsel as to the law of the case, it being conceded on both sides that the quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at its smallest point; that is, at the point where the least water can be carried through it. Nor is it questioned that the respondent is entitled to the quantity of water diverted by its predecessors in the winter of 1861, before the appellants can claim the additional quantity appropriated by them in the winter of 1862, by means of the enlargement of the old ditch. Therefore, the only material points to be determined were, first, the capacity of the Rose ditch at its smallest carrying point, and secondly, the capacity of the ditch built by the predecessors of respondent in the year 1861–2, as compared with its present ditch.

The court below found the capacity of the flume just below

the head of the Rose ditch, and which seems to be admitted was the point of smallest capacity, to be four and forty-eight one hundredths cubic feet per second; being the quantity capable of being carried by a flume twenty by eighteen and three fourths inches, on a grade of one eighth of an inch to the rod. We have not been able to find testimony in the record sufficient to sustain this conclusion. The only persons who appear to have testified respecting the dimensions and grade of this flume were Rose, Hunt, Rosenbecker and Chapin. As to the size of the flume in question, the finding that it was twenty by eighteen and three fourths inches is, perhaps, sustained by the testimony; but there appears to be no evidence directly sustaining the finding that its grade was only one eighth of an inch to the rod. Rose himself swears that the ditch had a grade of three feet to the mile, but that the flumes were on a grade of a half inch to twelve feet. To destroy the force of this evidence, it is claimed by counsel for respondent that the witness admitted in another portion of his testimony that at one point he built a piece of flume twenty-four feet in length on the same grade as the ditch, which would make it less than one eighth of an inch to the rod, as found by the court. The testimony relied on is thus given in the transcript: After stating that this flume was put there to carry the water of the ditch under Dana creek—to the question, “what was the grade of that short flume?” he replied; “I told you I had graded it myself. When the water came through, I put this in the bank, two lengths of it in that place. When the water came there I commenced the two joints of flume. Q. You could not connect it with the grade of the ditch, and let the water under it? A. Not at that point. Q. The surveyor made the grade when he surveyed the ditch? A. Yes; this was put in there in case the water should come down the ravine. Q. Did the surveyor, when he made that survey, indicate that as a piece of flume? A. I do not think he did. Q. The regular survey was made as though that was a ditch part, and you put in a piece of flume? A. Yes; the Chinamen had dug around the point before. Q. The grade of that must have been changed? A. When I came to dig it there, I went and cut a little across, and managed it so that I got the water high enough, so that I could start it into the ditch.” This is the testimony relied on by counsel as an admission that this

twenty-four foot flume was on a grade of only three feet to the mile. We can draw no such conclusion from it. The whole is rather indefinite; but if anything can be drawn from it, it is that the flume was not on the grade surveyed for the ditch, for the witness speaks of changing that grade. However that may be, even if it were admitted that it was on a grade of only three feet to the mile, it proves nothing in favor of the respondent; for the reason that the only evidence touching the dimensions of this piece of flume shows it to have been twenty-two by twenty-three inches, which is much larger than the flume above upon which the finding of the court is based. We do not think it is possible to interpret the testimony quoted, as showing with any degree of satisfaction what the grade of this short flume was. Furthermore, it appears to have been conceded by the parties in the court below that the capacity of the long flume, near the head of the ditch, was to determine the quantity of water appropriated, and upon its capacity the court below based its findings. Hence, it is but fair that the investigation in this court should be confined to the same section of the flume. The only distinct and satisfactory testimony by Rose, then, as to the grade of the flumes, shows them to have been one half an inch to twelve feet.

Hunt testified that his survey showed the general grade of the old Rose ditch to be about two and seven tenths feet to the mile. The general grade of the ditch may very well have been as stated by Hunt, and still the grade of the various flumes have been more than that. It is not claimed that he testified to the grade of the flume in question, or any flume specially; and it is perfectly manifest the grade of the flumes was greater than that of the ditch. So Hunt's testimony need not, and does not, necessarily conflict with the other evidence showing the flumes to have been upon a grade of one half inch to the twelve feet, or more. Chapin's testimony goes only to the dimensions of the long flume, a fact which we accept as found by the court below. The witness, Rosenbecker, swears positively that the grade of the flumes in the Rose ditch was three eighths of an inch to the rod; and he also swears that there was no flume in the ditch of less grade. The witness testifies that he measured the flume in question,

and took its grade. Hence, his testimony was based upon no conjecture or speculation, but upon actual measurement. This evidence together with that of Rose, is not, as we interpret it, directly contradicted by any witness or any calculation presented in the record. And as their testimony makes the capacity of the Rose ditch much larger than the court found it to be, we are compelled to set aside that finding and award a new trial.

Our conclusion upon this point renders it unnecessary to make any inquiry as to the relative capacity of the respondent's ditch of 1862, and that now used by it.

New trial ordered.

WHITMAN, J., did not participate in the foregoing decision.

REYNOLDS ET AL. V. HOSMER.

(45 California, 616. Supreme Court, 1873.)

Averments in complaint in suit for damages for sale of canal. In an action for damages for the sale of plaintiffs' interest in a canal and flume under a judgment which was afterward reversed by the Supreme Court of the United States, the complaint did not contain any direct averment that the canal and flume were ever constructed. *Held*, that this fact sufficiently appeared by necessary inference, and that it is not ordinarily necessary to aver the existence of the subject-matter about which litigation arises.

Amendments to complaint by permission not disregarded. Amendments to a complaint filed by leave of court before the arguments are concluded, will not be disregarded by the Supreme Court if there is nothing in the record to show that counsel for defendant were not present and consenting. Nor does it furnish ground for wholly disregarding the amendments, that the minutes of the clerk show that leave was obtained to file an amended complaint instead of amendments to the complaint.

Reversal of judgment operates ipso facto upon lower court. When the Supreme Court reverses the judgment of the lower court, and its mandate, to that effect is filed in the lower court, the judgment is reversed, whether the lower court makes an order conforming its judgment to that of the higher court or not.

Remedy for sale under judgment afterward reversed. If a sale be made under an erroneous judgment which is afterward reversed, and the plaintiff in the judgment be himself the purchaser, the doctrine now is that the former owner, after reversal, may, at his election, either have the sale set aside and be restored to the possession, or have his action for damages.

Estoppel. The fact that such former owner has moved in the lower court to have the sale set aside, and his motion has been denied, will not estop him from afterward affirming the sale and maintaining his action for damages.

Assignee of erroneous judgment liable for sale made under it. An action for damages for a sale under an erroneous judgment afterward reversed, is properly brought against the assignee of the judgment, who had control of the execution and purchased at the sale, and the original judgment creditor is not a necessary party.

Demurrer to complaint for uncertainty. A complaint, defective because it fails to show in whom is the title to the subject-matter in controversy, can not be reached by general demurrer; it should be attacked by special demurrer.

¹**Tenancy in common presumed—Parties.** The averment that the plaintiffs owned seven tenths of the canal, raises the legal presumption that they owned it as tenants in common, and in California tenants in common may sue jointly, or if one be dead his administrator may join with the other tenants.

Appeal from the District Court of the Twelfth Judicial District, City and County of San Francisco.

A corporation called the "South Fork Canal Company" constructed a ditch and flume for the purpose of carrying the waters of the south fork of the American river from a high point among the spurs of the Sierra Nevada mountains to the summit of the hills and high mining grounds surrounding the town of Placerville, El Dorado county. On the 12th day of June, 1854, George Gordon commenced a suit in equity in the District Court of the United States for the Northern District of California, against said corporation, to enforce a lien on the ditch and flume for work and labor performed on the ditch and flume and materials furnished therefor, and in the suit W. W. Reynolds and the plaintiffs here, Kirk and Isaac Reynolds, were co-defendants. About the 11th day of November, 1858, W. W. Reynolds died, and the plaintiff, James M. Reynolds, has been the administrator of his estate since the 16th day of

¹ *Nippel v. Hammond*, 4 Colo. 211.

March, 1859. Such proceedings were had in the suit that a decree was rendered in the Circuit Court of the United States for the Northern District of California on the 8th day of September, 1865, adjudging that there was due from the corporation to Gordon one hundred and fifty-one thousand and sixty-four dollars and twenty-one cents, and that the same was a lien on the whole ditch and flume, and that it be sold and the proceeds be applied to the satisfaction of the lien. A master in chancery was appointed by the decree to make the sale, and on the 8th day of November, 1865, the master sold the whole ditch and flume to Hosmer, the defendant here, for the sum of seventy-five thousand dollars. Hosmer, before the decree was made, had received an assignment from Gordon of all Gordon's right, title, and interest in the demand in suit. The sale of the master was confirmed, and on the 16th day of July, 1866, he gave Hosmer a deed conveying to him all the right, title, and interest of the defendants in the action. The amount of Hosmer's bid was credited on the amount found due by the decree, and Hosmer entered into immediate possession of the property. Before the sale, and on the 13th day of November, 1865, a writ of error was prosecuted from the decree to the Supreme Court of the United States. At the December term, 1867, the Supreme Court of the United States reversed the judgment and decree, and adjudged that the plaintiff had no lien on that part of the ditch and flume extending from the Grand Reservoir, near Placerville, to Long cañon, a distance of sixteen and one quarter miles, and issued a mandate to the circuit court with directions to enter a decree in conformity with the opinion of the Supreme Court.¹ On the 17th day of August, 1868, the mandate and opinion of the Supreme Court was filed in the circuit court, and on the same day the defendants and their successors in interest filed a petition in the circuit court to set aside the sale made by the master, and to modify the decree so as to make it conform to the opinion of the Supreme Court. On the 30th day of September following the circuit court denied the motion. At the time of the rendition of the decree of the circuit court, and at the time of the master's sale, and the confirmation thereof, James M. Reynolds, as administrator of the estate of

¹ *Canal Co. v. Gordon*, 6 Wall. 561.

W. W. Reynolds, deceased, owned six tenths undivided of the ditch and flume, and D. K. Newell owned one undivided one tenth thereof. On the 24th day of March, 1869, this action was commenced to recover damages for the sale of said sixteen and one quarter miles of the ditch and flume, extending from the Grand Reservoir to Long cañon.

The averment of the complaint in relation to the ownership of the property was as follows: "That at the time of the rendition of the said judgment and decree of the Circuit Court of the United States, and at the time of said master's sale, and at the time of the confirmation thereof, the plaintiffs were the owners of seven tenths of said canal, flume, and the appurtenances thereof, and the rents, issues and profits issuing out of the same."

This will illustrate the point made by the defendant that the complaint did not show that the estate of W. W. Reynolds owned any interest in the property.

The defendant demurred to the complaint, because it did not state facts sufficient to constitute a cause of action and because there was a misjoinder of parties by joining the plaintiff, James M. Reynolds, with the other plaintiffs, it not appearing that the estate of which he was administrator became interested in the ditch and flume by the same conveyance or title with the other plaintiffs, or that said estate was, at the time of the commencement of the action, jointly interested with the other plaintiffs in the damages claimed, and that the plaintiff Newell was improperly joined as plaintiff, because it did not appear that the plaintiffs held their interest as partners or joint owners, or that they were jointly injured or jointly interested in the cause of action. The court overruled the demurrer.

The defendant, in his answer, set up the order of the circuit court denying the motion to set aside the sale and to modify the decree as a bar to the action.

On the trial the plaintiffs' counsel, before the close of their argument, by leave of the court, filed an amendment to the complaint. The cause was tried without a jury and James M. Reynolds, the administrator, and D. K. Newell recovered judgment for the sum of seventeen thousand five hundred dollars and a judgment of dismissal was rendered as to plaintiffs Kirk and Isaac Reynolds.

GEORGE E. WILLIAMS and SHARP & LLOYD for appellant.

McCULLOUGH & BOYD, PARKER & ROCHE and G. G. BLANCHARD, for respondents.

By the Court, BELCHER, J.

This is an action to recover damages. The defendant demurred and answered to the complaint. The demurrer was overruled, and after trial the plaintiffs recovered judgment, from which the defendant has appealed. The points made relate to the sufficiency of the complaint.

It is insisted that the complaint is insufficient because it does not allege the existence of the property for the loss of which the plaintiffs claim damages.

It is alleged that the South Fork Canal Company was organized for the purpose of carrying water by means of a canal and flume to be constructed between certain points named; that an action was commenced against the company and others, and that such proceedings were had in the action that it was afterward adjudged by the Circuit Court of the United States that the plaintiff in the action had a lien upon the company's canal and flume for labor and materials furnished in their construction, and that the lien be foreclosed and the canal and flume be sold; that under and by virtue of this decree the canal and flume were sold; that the sale was approved, and thereafter a deed was made to the purchaser, describing the property as "the canal, flume, and ditch known as the South Fork Canal, with the appurtenances thereof, situated," etc.; that the judgment was afterward reversed by the Supreme Court of the United States, and it was by that court adjudged and decreed that the plaintiff had no lien on the canal and flume, extending, etc., a distance of sixteen and one quarter miles; and that at the time of the rendition of the judgment and decree by the circuit court, and at the time of the sale and the confirmation thereof, the plaintiffs were the owners of seven tenths of said canal and flume and the appurtenances thereof.

While in this there is no direct averment that the canal and flume were ever constructed, that fact clearly, and we think sufficiently, appears by necessary inference. It is not usual

and ordinarily is not necessary, to aver the existence of the subject-matter about which litigation arises. If the action had been ejectment for the canal, it would have been sufficient to have alleged the ownership of the plaintiffs and an ouster by the defendant. So, if it had been trespass, only the possession of the plaintiffs and the intrusion of the defendant need have been stated.

The point that the respondents are not shown by the complaint to have been parties to or connected with the action of *Gordon v. South Fork Canal Company* is answered by the amendments filed to the complaint. If it was error to overrule the demurrer on this ground, the error was cured when the complaint was amended. Nor are we at liberty to disregard these amendments. They were filed by the permission of the court before the argument was concluded and there is nothing in the record to show that the counsel for defendant were not present and consenting. The minutes of the clerk show, it is true, that leave was granted to file an amended complaint, while only amendments to the complaint were filed. This was undoubtedly an error of the clerk in writing up his minutes and furnishes no ground for wholly disregarding the amendments.

It is alleged in the complaint that after the mandate and opinion of the Supreme Court were filed in the circuit court, the respondents upon notice to the appellant, filed their petition to set aside the sale of the canal and to modify the original decree, so as to make it conform to the opinion of the Supreme Court, and their application was denied. It is claimed that this action of the circuit court left the original decree in full force and effect, notwithstanding the judgment of the Supreme Court, and that respondents' only remedy was either by a new appeal or by mandamus. We do not think so. When the Supreme Court reversed the judgment of the circuit court, and adjudged that the plaintiff had no lien on a portion of the canal, and its mandate was filed in the lower court showing those facts, the judgment was reversed, whether the lower court afterward made any order conforming its judgment to that of the Supreme Court or not. If the plaintiffs have any rights here, they come from the reversal by the Supreme Court and not from any subsequent action or want of action by the circuit court.

After the judgment was rendered in the circuit court but before the sale, the plaintiff in that action assigned to the defendant in this all his right, title and interest in the judgment and in the canal and flume. The defendant then caused the canal to be sold under the judgment and at such sale became the purchaser thereof for the sum of seventy-five thousand dollars. It is now contended that if, after the reversal by the Supreme Court, the respondents had any remedy as to that portion of the canal upon which it was adjudged by the Supreme Court that the plaintiff had no lien, their remedy was to recover back the property and not damages; or if they might recover damages then their action should have been against Gordon, the plaintiff in the action, and not against the appellant.

The doctrine formerly prevailed that whenever a sale was made under an erroneous decree or judgment, which was afterward reversed—the court rendering the judgment having jurisdiction of the person and subject-matter—the purchaser acquired a good title, notwithstanding the reversal. It was enough, it was said, for the buyer to know that the court had jurisdiction and exercised it, and that the judgment, on the faith of which he purchased, was made, and authorized the sale. With the errors of the court he had no concern. The former owner was then turned over to an action for damages to make good the loss of his property. That doctrine is now so far modified that, if the plaintiff in the judgment be himself the purchaser, the former owner, after reversal, may, at his election, either have the sale set aside and be restored to the possession, or have his action for damages: *Reynolds v. Harris*, 14 Cal. 667; *Johnson v. Lamping*, 34 Cal. 293.

The plaintiffs, under the rule stated, were clearly entitled to affirm the sale, and maintain their action for damages. Nor were they, in our opinion, estopped from so doing by their abortive attempt to have the sale set aside in the circuit court. Upon what ground their motion was denied does not appear; but it may possibly have been because the motion was made to set aside the whole sale, and not the sale of that portion of the canal upon which it was adjudged that the plaintiff had no lien.

But whatever may have been the reason, there is nothing in the complaint to show that the denial of one remedy could in any way operate as a bar to the successful prosecution of another and cumulative one.

The only other question under this head is, should the action have been brought against Gordon, and not against the defendant? It was not Gordon, but the defendant, who caused the plaintiffs' property to be sold under an erroneous judgment, and thereby produced the injury of which the plaintiffs complain. Why should the defendant not make good the loss which he himself has occasioned? We find no authority directly in point, but in *Maghee v. Kellogg*, 24 Wend. 32, it was held that money collected under a judgment which was subsequently reversed might be collected back in an action against the real parties plaintiff, when the suit had been prosecuted by the assignees of a chose in action in the name of the assignor. *Langley v. Warner*, 3 Coms. 327, is to the same effect. In *Bank of the United States v. Bank of Washington*, 6 Pet. 15, it was held that the reversal of a judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party had lost by reason of the erroneous judgment. In *McJilton v. Love*, 13 Ill. 486, the judgment had been assigned, and at the sale thereunder the property was purchased by the assignee, McJilton. The action was brought to set aside the sale and restore the possession. "The complainant," said the court, "made out a clear case for the interposition of the court of equity, as against Fairfield and Field and Hall. And McJilton occupies no more favorable position. He is not a stranger to the judgment. He is not entitled to protection as a *bona fide* purchaser under an erroneous judgment. He was the assignee of the judgment, and had the control of the execution when he became the purchaser of the lands. By the assignment he succeeded to no greater rights than Field and Hall had under the judgment. He took the judgment subject to all the equities subsisting between the original parties." If the assignee of a judgment, under which a sale has taken place at which he was purchaser, is not a stranger to the judgment, so as to entitle him to protection as a *bona fide* purchaser, then it is not easy to

see how he can defend against any appropriate action which the law gives to such case. On the whole we are of the opinion that the action is properly brought against the defendant.

It is also claimed that the complaint is insufficient, because, while the judgment is in favor of James M. Reynolds as administrator of the estate of W. W. Reynolds, deceased, the complaint fails to show that the estate of W. W. Reynolds ever owned any interest in the property. It is apparent, and is admitted, that the pleader intended to bring the action in the name of the administrator of the estate and for the estate. If the complaint is defective for not showing with sufficient certainty whether the title was in the estate or in the administrator, it was a defect for uncertainty, and should have been taken advantage of by special assignment in the demurrer. It was not reached by a general demurrer.

The last point presented is that there was a misjoinder of parties plaintiff, because the cause of action in favor of the estate of Reynolds and the cause of action in favor of Newell were several and distinct and not joint. The averment is that the plaintiffs owned seven tenths of the canal. The legal presumption is that they owned it as tenants in common. By statute in this State it is provided that all persons holding as tenants in common, joint tenants or coparceners, or any number less than all, may jointly or severally bring or defend any civil action for the enforcement or protection of the rights of such party. If one of the tenants be dead his executor or administrator may be joined with the other tenants: *Touchard v. Keyes*, 21 Cal. 208.

Notwithstanding the action was for damages, it was clearly for the enforcement of the rights which the plaintiffs had as tenants in common.

Judgment affirmed.

Mr. Justice CROCKETT did not express an opinion.

BARKLEY V. TIELEKE ET AL.

(2 Montana, 59. Supreme Court, 1874.)

- ¹ **Relief in equity for disputed water-rights.** When two parties each claim the prior right to the use of water for mining purposes, equity seems to be the only appropriate remedy to afford relief.
- ² **Conveyance of water.** A water right is, under the law of Montana, "such a species of realty" as to require for its transfer the same form and solemnity as the conveyance "of other real estate."
- ³ **Void deed—Abandonment—Appropriation.** Where the owner of a ditch attempts to convey the same by a deed which is void, but places the grantee in possession, who continues to use the ditch—it operates as an abandonment of his appropriation by the grantor and as a new appropriation by the grantee, dating from the change of possession.
- Recaption of abandoned water.** The prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another.
- ⁴ **Possessor of water right may have injunction.** A party in possession of a ditch and the water incident to the ditch, has such an equitable interest therein, that he can maintain an action for injunction against a party who attempts to appropriate the same.

Appeal from the District Court of Jefferson County, First Judicial District.

The judgment in this action was rendered by SERVIS, J., who tried the cause without a jury. The opinion refers to the following sections of the act relating to "conveyances of realty." "Every conveyance in writing, whereby any real estate is conveyed, or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided." Cod. Sts. 396, § 3. "The term 'real estate,' as used in this act shall be construed as co-extensive in meaning with lands, tenements, hereditaments and possessory titles to public lands in this Territory." Cod. Sts. 402, § 34.

S. ORR and TOOLE & TOOLE, for appellant.

G. G. SYMES and CHUMASERO & CHADWICK, for respondents.

¹ *Derry v. Ross*, 1 M. R. 1.

² *Park's Canal Co. v. Hoyt*, 57 Cal. 44; *Patterson v. Keystone Co.*, 30 Cal. 360; *Post SALE*.

³ *Copper Hill Co. v. Spencer*, 3 M. R. 267; *Smith v. O'Hara*, 1 M. R. 671.

⁴ *Lytle Creek Co. v. Perdew*, 1 West Coast R. 866.

SERVIS, J.

The plaintiff appeals to this court from the judgment of the court below, refusing a perpetual injunction.

The plaintiff and defendants both owned valuable mining ground, below Indian creek, in Jefferson county, Montana Territory, and owned ditches conveying the waters therefrom to said mining ground. The plaintiff's ditches were known as the "Freeman ditch" and the "Cedar gulch ditch." The defendants' was known as the "Tieleke ditch." Both claimed prior right to the waters of said creek. The findings of the court below sufficiently state the facts, which findings are as follows:

"First. The Freeman ditch was constructed in 1866 and diverted and appropriated 100 inches of the waters of Indian creek in that year.

"Second. The Cedar gulch ditch was constructed in the year 1867, and diverted and appropriated 150 inches of water from said Indian creek in that year.

"Third. That the Tieleke ditch was constructed by defendants in the year 1868, as original appropriators and diverted and appropriated 500 inches of water from said Indian creek in that year.

"Fourth. That both of said first-mentioned ditches were constructed by various persons other than the plaintiff or his immediate grantors, prior to the construction of the said Tieleke ditch, whereby the defendants sought to and did take the waters from said Indian creek against the will of the plaintiff after his purchase of the first-named ditches.

"Fifth. That the plaintiff and defendants respectively own valuable mines of gold, upon which they desire to use said water, and the said mines and ditches are comparatively worthless without the use of said water.

"Sixth. That the water of said Indian creek, during a good portion of the mining season, does not exceed 150 inches, and during some portions of the mining season does not exceed 250 inches of water; and that the respective claims of the parties are hostile, and for a great portion of the mining season one must give way to the other.

"Seventh. That the various persons constructing the Cedar gulch ditch and the Freeman ditch, by certain unsealed

and unacknowledged paper writings, purported to convey their respective interests therein to certain persons other than the plaintiff's grantors, but who, thereafter, and in like manner, by like paper writings, transferred the same to plaintiff's grantors, who took possession thereunder (and not by appropriation) prior to the appropriation and construction of the Tieleke ditch, who thereafter conveyed the same to plaintiff.

"Eighth. That one Freeman (to whom a part of the same had been so conveyed), in the year 1870, by deed duly executed, acknowledged and delivered, conveyed all his interest in said ditches to the plaintiff; and that Wilcox and Doughty (to whom the balance had been so conveyed), on the 6th day of September, 1870, by deed, conveyed all their interest in said ditches and water to said plaintiff, which deeds were in all respects in due form of law, except the acknowledgment thereof by Wilcox, which was done before a deputy county clerk of Montana Territory.

"Ninth. That the words 'dump ground,' as appears in the deed from said Wilcox and Doughty, were, by the consent of one of the grantors thereof, inserted therein after the delivery and recording of the same.

"Tenth. That the respective parties, up to the year 1870, mutually divided the waters of said Indian creek, and for the latter part of the year 1870, defendants, by compromise with Wilcox and Doughty, used all the waters of said Cedar gulch ditch."

The plaintiff insists that, under the facts as found by the court, there is shown to exist at least such an equitable title to the property in question as to entitle him to the relief demanded.

The defendants insist that before relief can be had under the claim made by plaintiff, he must resort to an action at law to settle the legal title to the property in question. That by the law of this Territory, such property is declared to be real estate, requiring for a conveyance thereof the same form and solemnity as of real estate in fee simple; that no such conveyance is shown to have been made to the plaintiff's grantors; and that, therefore, their appropriation of the waters of Indian creek is superior to plaintiff's.

Upon a review of the authorities, we are satisfied that chancery is a well-defined remedy for relief in an action in the nature of a nuisance of which this clearly partakes, without resort to an action at law. In fact, equity seems to be the only appropriate remedy to afford relief in cases like the one under consideration.

As to the *character* of the property or right in dispute, it is true, under our law, it is such a species of realty as to require for its transfer the same form and solemnity as the conveyance of any other real estate: Cod. Sts. 396, § 3; 402, § 34. Yet we can readily see how an estate or an *interest* in such kind of property can be acquired without such formality of conveyance.

Under the law of Congress, a *grant* of the kind of property in question is *presumed* by the act of appropriation. This may be lost by surrender or abandonment.

The conveyance or transfers of the property to plaintiff's grantors alone was not sufficient under our statute to convey the property to them; but the attempt so to do by imperfect conveyances, if it did not operate as an absolute or equitable conveyance, clearly operated as a surrender or an abandonment of their right, title and interest acquired by appropriation, which was the digging of the ditches in question. The *title* to these ditches is not controverted by the defendants, but only the waters of Indian creek carried through them. The water is but an incident to the ditches, and the right acquired to use it may be lost by abandonment, and when so lost, it becomes (*publici juris*) public property again, and subject to be recaptured, and when so recaptured, the original appropriators are estopped from re-asserting their claim to it; and if they are estopped, wherein can a stranger assert or claim any right to such property?

The defendants in no manner connect themselves with the plaintiff's title, unless it be their claim of prior appropriation, which is simply possession, the priority of which necessarily determines the question under consideration.

The pleadings and findings of the court establish the fact that plaintiff's grantors had obtained actual and rightful possession of the property in question, prior to the construction of the Tieleke ditch by defendants, and that they continuously

retained such possession until they conveyed the same to plaintiff, who, in like manner, continued the possession thereof until interfered with by the defendants.

If the conveyances to plaintiff's grantors did not in fact transfer such an interest as entitled them to all the rights of their grantors, then the right was abandoned, and the possession thereof taken by plaintiff's grantors was as much an original appropriation of the waters of Indian creek as if they had originally constructed the first ditches to divert the same. Such possession, even if it did not determine the *ownership*, under the act of Congress of March,¹ 1866, does nevertheless vest in the plaintiff such an equitable interest as to entitle him to maintain this action.

From all the facts and circumstances, we can not refrain from expressing our conviction that the defendants, when they located and constructed their ditch, did it with reference to, and with full knowledge of the prior rights of the Freeman and Cedar gulch ditches.

We are therefore of the opinion that the court below erred in refusing to decree a perpetual injunction against the defendants. The judgment of the court below is therefore reversed, with costs to be taxed against defendants.

The findings of the court below being, that the Freeman ditch conveyed 100 inches of the waters of said Indian creek, and that the said Cedar gulch ditch conveyed 150 inches of the waters of said creek, the injunction should therefore be so far made perpetual in favor of said plaintiff and against said defendants, and judgment is hereby rendered accordingly.

Judgment reversed.

¹BRODER V. NATOMA WATER AND MINING CO.

(50 California, 621. Supreme Court, 1875.)

Rights of ditch on public lands. The Mining Act of Congress of July 26, 1866, operated as a grant of the right of way and of the ditch, where a right to the use of water such as was "recognized and acknowledged by the local customs, laws and decisions of courts," had been acquired

¹ July 26, 1866, R. S. § 2339.

² Affirmed, U. S. Sup. Court, 5 M. R. 32.

at the date of its passage; and the subsequent grantees of the United States take subject to the easement.

U. S. grants to Pacific R. R. The Pacific railroad companies take the lands granted to them by the acts of Congress of 1862 and 1864, subject to ditch rights vested prior to the Mining Act of July 26, 1866, where, under the provisional terms of those grants, the equity of the grantee had not vested; and such equity did not vest before the certificate called for in the acts had been made by commissioners as to the completion of each section of forty miles.

Appeal from the District Court, Sixth Judicial District, County of Sacramento.

The defendant, in 1853 and 1854, constructed a ditch to convey water for mining purposes from the south fork of the American river, in the gold regions, to a point below Folsom. The ditch was about thirty miles in length, and of a capacity to carry fourteen thousand inches of water, and was excavated to carry water for sale to miners and others, and passed over public lands of the United States which were surveyed by the United States prior to 1865. The ditch passed through sections 28, 29, 32 and 33, of township ten, north of range eight east, Mount Diablo base and meridian. The plaintiff derived title to the northeast quarter of section 32 by a patent from the United States, dated November 1, 1867. He had been living on the land for many years prior to August 18, 1866, but filed his declaratory statement as a pre-emptor on the latter day. He derived title also to the northeast quarter of section 32 by deed from Jacob Broder, dated October 17, 1871. Jacob Broder received a patent from the United States on the 1st day of December, 1868. The United States, on the 27th day of June, 1867, issued to the Central Pacific Railroad Company, under the acts of Congress of 1862 and 1864, granting lands in aid of a railroad and telegraph line, a patent for the south half of the northwest quarter and the north half of the southwest quarter of section 33, and the northwest quarter of the southeast quarter, and the north half of the northwest quarter of section 33. The said company conveyed the land, part of it to Oswald Broder, and a part to Jacob, who then conveyed to Oswald. The lands were cultivated by the plaintiff, and he commenced this action on the

19th day of October, 1871, to abate the ditch as a nuisance. The land was within the division of the "forty consecutive miles" of the railroad which the railroad company completed in December, 1865, as stated in the opinion. The court rendered judgment for the defendant, and the plaintiff appealed.

R. C. CLARK and McKUNE & WELTY, for appellant.

C. G. W. FRENCH and C. A. TUTTLE, for respondent.

By the COURT.

The defendant having shown that prior to the act of Congress of July 26, 1866, it had acquired a right to the use of the water which was "recognized and acknowledged by the local customs, laws and decisions of courts," that act operated a grant to it of the right of way, and of the ditch through which the water was running at the date of the passage of the act. The subsequent grantees of the United States of tracts through which the ditch ran, took subject to defendant's easement.

There is no question that the government title to a portion of the lands described in the complaint was acquired by defendant after the passage of the act above mentioned; for the remainder, the plaintiff took deeds from the Central Pacific Railroad Company, the patents of the United States to that company having also been issued subsequent to the act of Congress aforesaid.

It results from the foregoing statement that the judgment of the district court must be affirmed, unless the Central Pacific company had a "perfect equity" at the date of the enactment of the United States statute of July 26, 1866. As establishing such equity, plaintiff relies on the fifth finding of the district court, which is, that in the month of December, 1865, the railroad company completed forty consecutive miles of its road. Section 4 of the act of 1862, "to aid in the construction of a railroad and telegraph line," etc., provides that (on the completion of forty miles, etc.) the president shall appoint three commissioners to examine the same, and report to him in relation thereto; that if it shall appear to him that forty consecutive miles of said railroad and telegraph line

have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue; "and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners."

The law places in the president or board of commissioners, or both, the power of determining whether the railroad company has performed the conditions prerequisite to the issuing of the patents. It is manifest that until the commissioners made their certificate, the company had no vested equity which can be recognized by the State courts. There is no finding that such certificate was made prior to the passage of the act of July 26, 1866.

Judgment affirmed.

BARNES, APPELLANT, V. SABRON ET AL., RESPONDENTS.

(10 Nevada, 217. Supreme Court, 1875.)

Appropriation of water. Where the right to the use of running water is based upon appropriation and not upon ownership in the soil, the first appropriator has the superior right.

Statutory law controls local customs. The act of Congress approved July 26, 1866, provides "that whenever, by priority of possession, rights to the use of water for mining, etc., purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." In construing this section it was *held* that the law with respect to the use of water may be shown by evidence of the local customs, or by the legislation of the State, or the decisions of the courts; and that the union of the three conditions is not essential to the perfection of the right by priority, but in case of conflict between a local custom and a statutory regulation, the latter must control.

State statute construed. The Nevada act of March 5, 1869, applies only to cases where persons desire to construct ditches through the lands of others, and find it necessary to condemn the land because the consent of the owner can not be obtained.

Prior and subsequent appropriation. The first appropriator of water has the right to insist that the water flowing in the stream appropriated, during the irrigating season, be subject to his reasonable use and en-

joyment to the full extent of his original appropriation and beneficial use, but others have the unquestionable right to appropriate the remainder of the water running in the stream.

¹ **Patent subject to vested water rights.** A party who receives from the State a patent for land, takes subject to the vested and accrued water rights of others under the act of Congress.

Conflicting testimony—Duty of courts. The duty of determining the truth where testimony is conflicting, belongs almost exclusively to the *nisi prius* courts, but it is also the duty of all courts to ascertain whether, upon any given state of facts it can be harmonized, before rejecting any of it.

Natural water course—Sinking stream. A stream in Nevada supplied at seasons from springs, but mostly from the melting snow on the mountains, having no regularity as to quantity of water from season to season, and at certain places at certain seasons having sinks, where the water disappears beneath the surface, leaving, however, a distinct channel, with bed and banks, is a natural water course—a “flowing stream of water”; a water course as distinguished from water flowing through ravines only in times of freshet; and it need not appear that it is water flowing continuously.

Possession of cultivated land not fenced. The plaintiff was held to be entitled to the use of the water of a certain creek for the purpose of irrigating the land which he had under cultivation, though not fenced, as well as for his stock and domestic purposes. Cultivation of land is an indication of possession whether inclosed or not.

A party in possession under a contract of purchase from the State is entitled to all the incidents and protection due to ownership.

Irrigator not allowed to waste water. The first appropriator is entitled to only so much water as is necessary to irrigate his land, and is bound to make a reasonable use of it.

² **Reasonable use—Ditch not used to its full capacity.** What amounts to a reasonable use depends upon the circumstances of each case, but a party who constructs ditches carrying a greater quantity should not be confined to the amount of water used by him the first and second years after his appropriation, nor his rights regulated by the number of acres he then cultivated; the object in view at the time of his diversion of the water is to be considered in connection with the actual extent of his appropriation by such ditches.

³ **Limits to appropriation—Test of ditch capacity.** If the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irrigation, for watering his stock, and for domestic purposes; but if the capacity of his ditches is not more than sufficient for those purposes, then, no change

¹ *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Farley v. Spring Valley Co.*, 58 Cal. 142.

² *White v. Todd's Valley Co.*, 4 M. R. 536; *Ellis v. Tone*, 58 Cal. 291; *Union Co. v. Dangberg*, 2 Saw. 450; *Post* IRRIGATION.

³ *Caruthers v. Pemberton*, 4 M. R. 622.

having been made in the ditches since constructed, and no question of the right of enlargement being involved; he must be restricted to the capacity of his ditches at their smallest point.

¹ **Division of water by intervals of time.** If A has appropriated water during certain days in the week, or during a certain number of days in the month, B may appropriate it and become entitled to its use on the other days of the week or month.

Damages for diverting water—Contributory negligence. If a man is deprived of three fourths of the water he is entitled to by the wrongful act of another, it is no defense to an action for damages that he has allowed a portion of the remaining fourth to run to waste. The doctrine of contributory negligence has no application to such a case.

Nominal damages—Decree fixing amount of water party is entitled to. Defendants diverted water from plaintiff's crops, claiming to have the better right thereto: *Held*, that though plaintiff suffered no actual damage, yet the diversion might by lapse of time ripen into a prescriptive right, and for this reason plaintiff was entitled to recover nominal damages, and to an equitable decree declaring the amount of water to which he was entitled.

Findings construed. The findings of fact by the court are like a special verdict of a jury, and must be taken in connection with the pleadings to support the judgment; they can not be detached from each other, but must be read together for the purpose of ascertaining their meaning, and if there is any conflict or discrepancy between general and special findings, the specific findings must control.

Order refusing new trial reviewed. Upon application for a new trial, as provided by the Practice Act, the court is authorized to decide whether the findings sustain the judgment, and its action can properly be reviewed by the Supreme Court on appeal from an order overruling the motion for new trial.

Appeal from the District Court of Nye County, Fifth Judicial District.

This was an action to recover damages for the diversion of water, brought by plaintiff against the defendants, Joseph Sabron, Alexander McCullough, David H. Lemmon, Joseph Travis, Samuel Kain, E. Shelby, Anna Whithall and Walter Whithall.

The material allegations of the complaint are that plaintiff is the owner in fee simple of six hundred acres of land (describing it); that said land is agricultural and will produce good crops of grain and vegetables with water, but without water will produce no crops; that the water of Currant creek

¹ *Smith v. O'Hara*, 1 M. R. 671.

—a natural water course and surface stream—from time immemorial has flowed, and, when unobstructed and not diverted, now flows in the natural channel of said stream into, through and upon said land, and thereby moistens, irrigates and benefits the same and the crops of grain and vegetables growing thereon, and supplies said plaintiff with water for his stock and for domestic purposes and for the irrigation of his land and the crops growing thereon; that there is no other source except said stream from which plaintiff can obtain water for the purposes aforesaid; that plaintiff and his grantors were the first locators of land on said stream, and the first to appropriate the waters thereof and to put the same to a useful and beneficial purpose; that on the 16th of September, 1868, plaintiff and his grantors appropriated all the water flowing in the natural channel of said stream for the purposes above mentioned, and ever since, except when prevented by the wrongful and unlawful diversion of said defendants, have used the water for the irrigation of said land and crops growing thereon, etc.; that during the months of May, June, July and August, 1873, plaintiff had a large crop of grain and vegetables growing on said land; that defendants during said months wrongfully and unlawfully diverted the water flowing in said stream, and turned the same out of its natural and usual channel and obstructed and retarded its flow and prevented it from flowing into, through and upon said land as it was accustomed to do; that by reason of said wrongful and unlawful acts plaintiff, during the months aforesaid, was deprived of sufficient water to irrigate said lands, etc., and during the last two of said months he was deprived of all the water of said stream for any purpose whatever; that by reason of the wrongful and unlawful acts of defendants plaintiff has been injured and damaged in his crop of grain to the extent of forty-two tons of the value of sixty gold coin dollars per ton; that said defendants and each of them now threaten to continue, and unless enjoined will continue, wrongfully and unlawfully to divert and obstruct the water of said stream permanently away from the natural channel thereof, and are and have been, and unless enjoined will continue to prevent the same from flowing into, through and upon said land, and are and have been depriving plaintiff of the use of said water

for the purposes aforesaid to the injury and damage of said plaintiff's right, and to the injury and damage of his land and crops as aforesaid in the sum of two thousand five hundred and twenty dollars. Plaintiff prays for a restraining order against defendants; that plaintiff be decreed a usufruct in all the water of said stream; that he have judgment for the sum of two thousand five hundred and twenty dollars for his costs and for such other and further relief as may seem just and equitable.

The defendants filed separate answers, denying specifically each and every allegation in said complaint contained. For further answer, each of the defendants set up their title to certain lands on the banks and bed of the stream. Defendant Sabron avers that his land is situated below the upper sink of Currant creek; that Currant creek rises again to the surface east of the eastern line of his land, and flows thence in and upon his land; that said Currant creek again sinks before it leaves his land. For further answer defendant Sabron avers that he and his grantors were the first appropriators of the waters of Currant creek below the upper sink thereof, and the first to subject the same to useful and beneficial purposes; that irrigation is indispensable to the cultivation of his land; that by reason of his right of ownership in the soil, embracing both banks and the bed of that portion of the stream which flows and runs in and upon his lands, he is entitled to the reasonable use of the waters thereof for purposes of irrigation, for his stock and for domestic purposes; that he has not at any time when using the water of that portion of the stream below the upper and above the lower sink thereof, permitted the same or any portion thereof to run to waste, nor improvidently or wastefully used the waters of said stream, so as to materially or appreciably affect the rights of said plaintiff or those living upon any portion of said stream below him; that the only waters at any time appropriated by said plaintiff or his grantors were the waters of certain springs having their rise upon the land formerly owned by Jacob Slaght, and now claimed by plaintiff, and that said springs are situated below the lower sink of Currant creek. Similar averments are contained in the answers filed by the other defendants.

The facts are sufficiently stated in the opinion.

ROBERT M. CLARK, for appellant.

HILLHOUSE & DAVENPORT and T. W. W. DAVIES for respondents.

By the Court, HAWLEY, C. J.

This action was brought by plaintiff to recover damages from defendants for the alleged unlawful diversion of water during the months of May, June, July and August, in the year 1873, to enjoin further diversion and to obtain a decree declaring plaintiff to be entitled to the use of all the waters of Currant creek.

The cause was tried before the court without a jury, and judgment was rendered in favor of defendants for costs.

Plaintiff appeals from the judgment and from the order of the court overruling plaintiff's motion for a new trial.

The case comes up for review upon the "statement on motion for a new trial," and the appeal is based upon the grounds that the findings are contrary to the evidence and that the judgment is not supported by the findings. It appears from the testimony that plaintiff and defendants are owners of respective ranches, or farms, situate upon the stream known as Currant creek, in Nye county; that defendant Sabron has title in fee to the land; his patent was issued by the State of Nevada, in January, 1874; that plaintiff has a contract for a deed from the State, dated May 15, 1873, said contract being drawn in pursuance of section 9 of the act entitled "An act to provide for the selection and sale of lands that have been or may hereafter be granted by the United States to the State of Nevada," approved March 5, 1873 (Stat. 1873, 120); that the other defendants have only a possessory title to their land; that all the land is agricultural and requires water for irrigation to make it productive; that plaintiff owns two ranches; the lower one was located by him in September, 1868, and the upper one, designated as the "Slaughter ranch," was located in January, 1869; that defendant's ranches are located on Currant creek, above the land of plaintiff; that Sabron's land was located in November, 1868, Lemmon's in December,

1868, and the other defendants are all subsequent in date to the Slaght ranch; that as early as the 6th day of January, 1869, a ditch was constructed on plaintiff's lower ranch, which, he testifies, "was sixteen inches deep by thirty-six inches wide," of sufficient capacity to carry, according to the testimony of the witness Rock, four hundred and thirty inches of water, and diverted water from the creek through and upon plaintiff's land, for irrigating purposes; that in February, 1869, plaintiff dug another ditch upon another portion of his land, for the same purpose, which, he testifies, "was three feet wide and sixteen to twenty inches deep, and further testifies that no change has been made in either of these ditches since they were constructed, and that he has always used the same and had water running therein, during the summer seasons, to irrigate his land; that these were the first ditches through which water was diverted from the channel of Currant creek; that there is a conflict in the testimony as to the capacity of these ditches, the testimony introduced by defendants tending to show that these ditches were not more than twelve inches wide and two or three inches deep; that in April, 1869, defendant Lemmon constructed two ditches, one on the north, the other on the south side of the creek, diverting water from a creek that heads about eighty rods above the head of his ditches, and from springs; that by means of his ditches he has about three hundred and fifty inches of water; that about the fifteenth of April, 1869, a ditch was commenced on defendant McCullough's land, of sufficient capacity to carry two hundred inches of water; that in May, 1869, there was a ditch constructed which diverted the water from the creek, upon and through the land of Sabron, that was two feet wide, spade deep, and of sufficient capacity to carry two hundred inches of water; that in April, 1870, on the upper end of Sabron's land, there was a ditch constructed three feet wide and twenty inches deep—for one hundred yards—capable of carrying all the waters of Currant creek; that in May, 1869, there was a ditch on the Slaght ranch, which, plaintiff testifies, was at its mouth two by three feet, and that its depth, for forty yards, was about two feet; that the Slaght ranch was irrigated by this ditch from the Slaght springs, which are in the bed of the creek on this

ranch, and which, Slaght testifies, "are a drainage of water from above;" that the quantity of water flowing from these springs is variously estimated at from twenty-five to one hundred and fifty inches; that plaintiff cultivated in 1869—according to his own testimony—about twenty-five acres of land on his lower ranch, in 1870 sixty acres, in 1871 sixty-five acres, in 1872 sixty-seven and one half acres, and in 1873 seventy-five acres; that there were cultivated in 1869, on the Slaght ranch, about seven acres, in 1870 forty acres, in 1871 eighty acres, and in 1873 fifty acres; that on Sabron's land, in 1869, there were cultivated about three and one half acres, in 1870 thirty-five acres, in 1871 sixty-five acres, and in 1873 one hundred acres; that Lemmon cultivated, on his land, in 1869, eighteen acres, in 1870 forty acres, in 1871 fifty-five acres, in 1872 seventy-five acres, and in 1873 about ninety acres; that in 1869 McCullough cultivated about four acres; that the other defendants commenced cultivating and irrigating their lands after the year 1869; that in 1873 there were about one hundred more acres of land cultivated than in any previous year; that plaintiff testifies that in 1869 he used one hundred inches of water, in 1870 from two hundred to three hundred inches, and that he needed, in 1873, from three hundred to three hundred and fifty inches of water; that the defendants introduced testimony tending to show that plaintiff, in 1869, only cultivated on his lower ranch from twelve to thirteen acres, and only used from fifteen to eighteen inches of water, and that on the Slaght ranch only water enough was used to irrigate the land under cultivation, amounting to eighteen or twenty inches; that the amount of water required to irrigate the crops of grain and vegetables on the land is estimated at from one to two inches per acre, constant use; that the irrigating season commences about the first of May and ends about the last of August; that plaintiff's crops of grain and vegetables suffered for want of sufficient irrigation in 1873.

These facts we glean from the record, independent of the pretended findings of facts in the court below.

Without drifting along with counsel upon the sea of uncertainty as to the law, it becomes necessary before reviewing the findings to determine the legal principles that must be

considered in connection with the facts of this case. The question whether a right to running waters on the public lands of the United States for purposes of irrigation can be acquired by prior appropriation, as against parties not having the title of the government, has recently been decided in the affirmative in the case of *Basey v. Gallagher*, in the Supreme Court of the United States. Justice FIELD, in delivering the opinion of the court, said: "In the late case of *Atchison v. Peterson* (20 Wall. 507) we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government by its silent acquiescence had assented to and encouraged the occupation of the public lands for mining, and that he who first connected his labor with property thus situated and open to general exploration did, in natural justice, acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was, at an early period, recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers,

or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one": 20 Wall. 670.

The act of Congress approved July 26, 1866, provides: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same": 14 Stat. U. S., Sec. 9, 253.

In *Basey v. Gallagher*, it was decided that it was "very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control."

This act of Congress was in force when plaintiff and defendants acquired their respective rights to the waters of Currant creek. No testimony was offered on the trial of this case by either party, as to the existence of any local custom, nor is there any statute of this State which recognizes the right of prior appropriation of water for the purposes of irrigation. The act entitled, "An act to allow any person or persons to divert the waters of any river or stream, and run the same through any ditch or flume, and to provide for the right of way through the lands of others," approved March 3, 1866, and amended March 5, 1869 (2 Comp. L. 415), is not, in our judgment, applicable to this case. It was intended to apply to cases where persons were desirous of constructing and maintaining a ditch or flume through or over the lands of another, and to provide for a right of entry upon such lands for the purpose of surveying such ditch or flume, and

to declare how such lands might be condemned where the same could not be obtained by the consent of the owner. There is no declaration that upon compliance with any of its provisions any right of priority will be secured, and the fact that neither plaintiff nor defendants conformed to the requirements of this law does not in any manner affect their rights in this action.

The doctrine that the first appropriator has the superior right, "where the right to the use of running water is based upon appropriation, and not upon an ownership in the soil," has been recognized and acknowledged by the decisions of this court in *Lobdell v. Simpson*, 2 Nev. 274, and the *Ophir S. M. Co. v. Carpenter et al.*, 4 Nev. 534.

The facts of this case do not call in question the correctness of the decision in *Van Sickle v. Haines*, 7 Nev. 249, where the title to the land had been obtained from the government prior to the acts of Congress herein referred to.

It logically follows from the legal principles we have announced that the plaintiff, as the first appropriator of the waters of Currant creek, has the right to insist that the water flowing therein shall, during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use. To this extent his rights go, but no further; for in subordination to such rights the defendants, in the order and to the extent of their original appropriation and use, had the unquestionable right to appropriate the remainder of the water running in said stream: *The Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 143; *The Nevada Water Co. v. Powell et al.*, 34 Cal. 109.

In 1870 Congress amended the act of 1866, and provided: "That none of the rights conferred by sections five, eight and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory:" 16 U. S. Stat. 218,

Sec. 17. The certificate of plaintiff from the State and the patent of Sabron must, under the provisions of this law, be held subject to such vested and accrued water rights as were acquired by the respective parties under the ninth section of the act of 1866. The findings of fact in the court below (here numbered for convenient reference), are as follows:

1. "That Currant creek is not a living surface stream of water, continuously flowing; but that the same is supplied at certain seasons of the year from the snows on the mountains above the valley and from springs having their rise and flow along the banks and bed of the same; that the channel of the same has been formed from the high freshets produced by the melting snow on the mountains."

2. "That the waters derived from the springs along the banks of said stream would not reach the premises of the plaintiff if the same were to remain unobstructed and uninterrupted; that the waters of the springs along the banks and bed formed by the freshets in the spring of the year sink and entirely lose themselves in the sand, gravel and debris, deposited in the bed formed as above stated; that said waters sink and disappear beneath the surface of the earth; that there is no evidence to establish the fact of the existence of a subterranean vein or channel of water; that the rise of water in the bed formed as above, is from the percolating water in the earth beneath its surface."

3. "That the plaintiff at all times has had the uninterrupted enjoyment of all the water first appropriated and beneficially used by him; that the amount of water first appropriated and beneficially used by him is continuously supplied to him from the springs rising upon the lands of plaintiff, formerly known as the Slaght ranch, and below the premises of either of these defendants."

4. "That at the instance and request of this plaintiff the defendants permitted him the use of water above the last-named springs, to flow to plaintiff's premises, (and that) it was necessary to confine and flow the same through the ditch of defendant Sabron, in order that the water might connect with the waters of the springs on the Slaght ranch."

5. "That if all the water above the Slaght ranch had been turned into the bed formed as hereinbefore stated,

that the same would have sunk and disappeared before forming a connection with the waters of the springs on the Slaght ranch, and thereby have proved fruitless and of no avail to said plaintiff."

6. "That the plaintiff, at the time he needed the use of the water upon his crops of grain and vegetables, by his own acts permitted the water which had been turned down to him by defendants, from above, through their ditches, to flow past his premises for the use and benefit of other parties below him, thereby contributing to his damage."

7. "That by no act or acts of these defendants, or either of them, has this plaintiff sustained damage in any amount whatever."

The court finds as matters of law: "That the plaintiff is not entitled to recover, and that he take nothing by reason of his suit; that defendants are entitled to recover of said plaintiff their costs in this behalf expended; that no injunction, either temporary or perpetual, issue against said defendants, or either of them, their agents or employes."

The duty devolved upon courts, of determining the truth where the testimony is conflicting, is always unpleasant, and often difficult. It belongs almost exclusively to our *nisi prius* courts, and should always be exercised and determined by an impartial judgment. It is, indeed, almost impossible for an appellate court to ever satisfy itself upon such questions, so much really depends upon the manner, bearing, character of witnesses, and the peculiar circumstances of each case, which the transcript fails to preserve, and which always give value and weight to testimony. Hence it is that appellate courts are seldom, if ever, inclined to disturb the findings of the court below, where there is a substantial conflict in the evidence, if sufficient appears in the record to support the findings. Where there is a conflict, the question is often presented as to which of the witnesses, apparently of equal credit, had the best opportunity to ascertain, or which was most likely, on account of his interest, position, circumstances or surroundings, to remember the facts. Again, it does not necessarily follow that because there is a conflict in the testimony, that one or the other of the witnesses have testified falsely, and that the court must take the whole statement of one and

reject the entire testimony of the other. It is the duty of all courts first to ascertain whether or not the testimony can be harmonized upon any given state of facts, before any part thereof is rejected. With these rules in view we have examined the testimony to ascertain whether the "findings" are supported by the evidence.

It appears from the testimony that Currant creek is partly supplied, at certain seasons of the year, from springs having their rise and flow along its banks and bed, but mostly from the melting snow on the mountains. There is no regularity as to the quantity of water, for, to quote the language of several of the witnesses, "no two seasons are alike," the amount of water flowing being dependent upon the character of the weather during the preceding winter. After a cold winter, when deep snows have fallen, the water flows in greater quantity and for a longer time than after an open winter with but little snow; hence the amount of water varies in the summer season, according to statements made by different witnesses, from nothing to five thousand inches. There is a conflict of evidence as to the real character of this stream; the conflict, however, is principally confined to the question, whether the water therein "continuously flows." The fact that should have been found by the court below was, whether or not Currant creek was a natural water course and surface stream. To ascertain that fact, it was not necessary to determine whether the water was *continuously flowing*.

"A water course," says Angell, "consists of bed, banks and water; yet the water need not flow continually, and there are many water courses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water which, at certain seasons, is dried up, and those occasional bursts of water which, in times of freshets or melting of ice and snow, descend from the hills and inundate the country." (Angell on Water Courses, Sec. 4.) This distinction was entirely ignored by the court below. We are of opinion that the testimony clearly shows that Currant creek belongs to the first class referred to by Angell; that it is a "flowing stream of water," a water course as distinguished from water flowing through hollows, gulches or ravines only in times of rain or melting snow.

The finding "that the same is supplied at certain seasons of the year from the snows on the mountains above the valley, and from springs having their rise and flow along the banks and bed of the same" (being sustained by the evidence), gives to this creek the character of a natural water course, in so far as finding one is involved. It is well settled that in order "to maintain the right to a water course or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to *flow continually*, * * * and it may at times be dry, but it must have a well-defined and substantial existence." (Angell, *supra*.)

Findings two and five will be considered together. They are, in our judgment, without substantial support in the testimony. It is true that at certain places on the creek, at certain seasons of the year, the waters from the springs flowing in said stream "did sink and disappear beneath the surface of the earth," but in nearly every instance it is shown either that it occurred when defendants were diverting all, or nearly all, of the waters from the creek, or that the water after sinking beneath the surface appeared within a very short distance in the bed of the stream. It appears from the testimony that at a certain point on the creek where it flows through the land of defendant Sabron, the water flowing in the natural channel from above loses its force, the bed of the stream rises causing the water to spread out and run in different channels; as the soil is sandy a portion of the water is absorbed and the quantity flowing in the creek below is considerably reduced. In support of these findings defendants introduced considerable testimony, a portion of which we quote. Lemmon testifies that about three miles above the narrows there are some springs that afford about twenty inches of water, which run a short distance and sink; above them it is dry, during dry seasons, for one mile above Kain's house. Holloway testifies that "in the forepart of August, 1872, about two hundred yards above Travis' house the water sunk; * * * a short distance below Travis' house, about fifty yards, the water appeared again in the bed of the stream." Boyd testifies that in 1870, upon Sabron's ranch, after water was turned into the creek it did not get to plaintiff's ranch until the next year;

but he says that in June and July, 1870, after irrigating land on Sabron's ranch for two days, the water was turned off and that it found its way into the channel and run down to Slaght's ranch. English testifies that "if the water should flow unobstructed from Whitehall's place to the Slaght place, a great deal of it would sink all the way down." He also testifies that he knew a place on Sabron's land, between those two places, where the water sinks, for he had "seen it dry for several months in succession"; yet he adds that "in irrigating season, the water, if turned into the natural channel and not obstructed, might run over the bar at Sabron's place. I have seen it run over the bar plenty of times. * * * I saw water running over the bar last year (1873) in the summer months. * * * I saw water running on the bar in May and June, 1873." Dennet testifies that in June, 1869, at the point where the water spread out, it did not reach Sabron's ranch at the lower end. We have quoted the most favorable testimony for defendants, and it, in our judgment, fails to sustain the findings. When all the testimony bearing upon these findings has been sifted from the rubbish found in the record and closely scrutinized, we think the truth is that when the defendants were diverting all the water in the summer season the bed and bar became dry, and if either one of the defendants turned the water down without the co-operation of the others, but a small proportion, if any, of the water thus turned down into the natural channel would ever reach the premises of plaintiff; but if the water was all turned down and allowed to flow in the natural channel without interruption, it would run over the bar and reach plaintiff's land, although its quantity might be reduced; the amount lost being to some extent dependent on the amount flowing in the creek—the greater the amount the less the proportion reduced.

Plaintiff's appropriation, when made, applied to the then condition of the stream. At that time and for several years afterward sufficient water flowed down to plaintiff's premises to irrigate his land, independent of the water flowing from the Slaght springs. This was the condition of the creek until defendants commenced using all, or nearly all, the waters from above to irrigate their lands. The fact that their use of the water has caused the channel to dry up, is

no excuse for depriving plaintiff of the amount of water to which he is entitled by virtue of his prior appropriation. All the defendants procure water from the surface, either from the creek or from springs, and no facts are presented which call in question the legal rights of any of the parties to percolating waters beneath the surface of the earth.

The first clause of finding three is a conclusion dependent upon facts not found by the court. How much water was plaintiff entitled to as the first appropriator? Upon this important question the finding is silent; yet the court says "that plaintiff at all times has had the uninterrupted enjoyment of all the water first appropriated by him," and evidently bases this part of the finding upon the latter clause, "that the amount of water first appropriated and beneficially used by him, is continually supplied to him from the springs rising upon the lands of plaintiff, formerly known as the Slight ranch, and below the premises of either of these defendants." How much water is supplied to plaintiff from these springs? No answer to this question can be found by examining the findings. It is questionable whether such a conclusion based upon such an uncertainty rises to the dignity of a finding of fact worthy of review. From the phraseology of the last clause, it may be that the court was of the opinion that plaintiff should be limited in his rights to the amount of water actually used by him in the first year of his appropriation. The words "first appropriated and beneficially used" are susceptible of that construction. The plaintiff's rights to the water are not, however, dependent upon the amount beneficially used by him in the first year of his appropriation, as will more fully appear in our review of other findings; hence this view of the case can not be sustained.

The position contended for by respondents' counsel, that this finding could be sustained upon the ground that plaintiff had failed to produce any title or prove actual possession to more than fifteen acres of land, that being the amount inclosed by a substantial fence, and that he was only entitled to sufficient water to irrigate that number of acres, is equally untenable. From an examination of the record it is manifest that no such question was presented or considered in the lower court, and it is doubtful whether from the facts of

this case we are called upon to consider it. The objection will, however, be briefly noticed. From the testimony it clearly appears that plaintiff cultivated at least one hundred and twenty-five acres on his two ranches. There is no testimony showing that it was necessary to inclose the land in order to cultivate it. The plaintiff must be considered as in possession of all the land actually under cultivation. In addition to plaintiff's proof of actual possession, he introduced without objection a contract of purchase from the State of Nevada for the lower ranch (three hundred and twenty acres). To this land he has the beneficial estate or interest, as well as the possession, and as such equitable owner and actual possessor is entitled to enjoy all the incidents to the land and its ownership, as well as the land itself. In our judgment, he is entitled to the use of the waters of said creek for the purpose of irrigating the land under cultivation, as well as for his stock and domestic purposes.

Finding four is, to some extent, sustained by the evidence. It is true that at the instance and request of plaintiff the defendants permitted a portion of the water above the Slaght springs to flow to plaintiff's premises for a period of from two to four days; it also appears, however, from the testimony, that defendants thereafter refused to allow the water to flow down to plaintiff, claiming a right thereto adverse to plaintiff. In this respect the finding ought to have been qualified so as to conform to the facts. Again, it was not necessary, as the finding states, "to confine and flow the same through the ditch of defendant Sabron, in order that the water might connect with the waters of the springs on the Slaght ranch."

We have, upon reviewing other findings, decided that the water, if left unobstructed and uninterrupted, would flow down to plaintiff's premises, but that its quantity would be diminished. The plaintiff requested defendant Sabron, when the defendants turned the water down, to let it run through his ditch instead of the natural channel, "because," says plaintiff, "the natural channel was dried up; there had been no water turned into it for some time, and it would take the water some time to get to my place through it." This was the fact, and it ought to have been so stated in the finding.

Is finding six sustained by the evidence?

The testimony shows that about the middle of June the plaintiff turned all the water down to his neighbors below. He says that "at that time their crops were suffering badly for want of water;" that his own crops "had just been irrigated once, but were suffering on the edges some," and that if he had had water sufficient after this, "his crops would have been good." The water used by Cook must be considered as having been used by the plaintiff. Cook was farming on the lower end of plaintiff's lower ranch, and had plenty of water to irrigate some thirteen acres of land leased from plaintiff; he used the water during the months of May, June, July and August, and at times when plaintiff needed the water on his own crops. When Cook leased this land plaintiff agreed to furnish him with water. Plaintiff had an undoubted right to furnish the water to his tenants, or to allow them to use it; but if by allowing them to use more than was necessary to irrigate the leased land he was deprived of the water for his own use, he could not hold defendants responsible for any damages to his crops which were caused by allowing his tenants to use more water than was necessary to irrigate their lands; certainly not, if defendants allowed the quantity of water to which he had a prior right to flow down to his premises. The water used by English must also be considered as having been used by the plaintiff. English testifies that he used water in 1873, on Sabron's ranch, without permission of any one:—"when it came down I took it." It seems that plaintiff claimed the land which English cultivated, and knew that he was using the water when it came down and never objected to it; in fact, English testifies that plaintiff told him he could have the water. The plaintiff not only allowed Cook and English to have a very liberal supply of water (more, in our judgment, than appears from the testimony to have been necessary to irrigate their lands), but allowed the water to run down to his neighbors below him at times when his own crops needed irrigation. It is difficult to determine from the record the exact amount of water that was allowed by plaintiff to pass his premises. Lemmon testifies that on the 15th of June he was at plaintiff's ranch and saw water running in the creek past plaintiff's premises. "I am positive," says witness,

"there was three hundred inches; think there was five hundred inches." On the 6th of July, Lemmon was at plaintiff's ranch, and he testifies that at that time a portion of the water ran in the creek bed and a portion in a ditch; that he could not say whether plaintiff was using this water, as he did not go below the house, but plaintiff told him "the water was going below McKenzie." Again, about the first of August, Lemmon had another conversation with plaintiff about the water. Lemmon asked him if he got the water, and he said in reply that "he got all he wanted." Boyd testifies that he was at plaintiff's ranch twice, about the last days of June, and "that there was a large body of water running down the creek both times." He describes its bulk at three or four feet wide and two inches deep, with a swift current. Plaintiff commenced harvesting his crops of grain on the 21st day of July and finished in the early part of August. It is shown that he raised a better crop than defendant Sabron, who at all times had plenty of water.

In the application of this testimony to the question under consideration, it must be borne constantly in mind that the defendants turned down the water and allowed it to flow to plaintiff at or about the time plaintiff allowed it to run to waste. In this connection must also be considered the declarations of plaintiff as to the condition of his crops and the amount of water needed to irrigate the same. Sabron testifies that a short time after the 4th of July, 1873, he was at plaintiff's lower ranch; that plaintiff "complained of not having plenty of water," and said to witness, "If you will let me have water for the wheat I can get along; * * * the upper ranch is all right;" and that the defendants let him have water to irrigate his wheat. McCullough testifies that between the 4th and 15th of July he was on plaintiff's ranch; that plaintiff then said that if defendants would let him have water four days he could save his wheat; that he did not want any more water on the Slaughter place—it was safe. "We agreed to let him have water, and he got water."

If plaintiff did not require the full amount of his appropriation, he could not hold the defendants responsible in damages for not turning it down to him; he was only entitled to

as much water—within his original appropriation—as was necessary to irrigate his land, and was bound, under the law, to make a reasonable use of it. In a dry and arid country like Nevada, where the rains are insufficient to moisten the earth, and irrigation becomes necessary for the successful raising of crops, the rights of prior appropriators must be confined to a reasonable and necessary use. The agricultural resources of the State can not be developed, and our valley lands can not be cultivated, without the use of water from the streams, to cause the earth to bring forth its precious fruits.¹ No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law, and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. The law which recognizes the vested rights of prior appropriators has always confined such rights within reasonable limits. “We say within reasonable limits,” with the court in *Basey v. Gallagher*, “for this right to water, like the right by prior occupancy to mining ground, * * * is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.” What is a reasonable use depends upon the peculiar circumstances of each particular case. In this case plaintiff should not be confined to the amount of water used by him in 1869 or 1870, nor his rights regulated by the number of acres he then cultivated. He did not cultivate more land because “his team was poor” and he “had no money to hire help.” The object had in view at the time of his diversion of the water must be considered in connection with the actual extent of his appropriation. If the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irrigation, for watering his stock and for domestic purposes. If, however, the capacity of his ditches is not more than sufficient for

¹ *Yunker v. Nichols*, 1 Colo. 551; *Post IRRIGATION*; *Schilling v. Rominger*, 4 Colo. 100.

those purposes, then, under all the facts of this case, no change having been made in either of plaintiff's ditches since they were constructed, and no question of the right of enlargement being involved, he must be restricted to the capacity of his ditches at their smallest point; that is, at the point where the least water can be carried through them: *Ophir S. M. Co. v. Carpenter et al.*, 6 Nev. 393.

If defendants could save any water by turning it around the bar on Sabron's land and thereby procure a greater quantity for their own use, they have a right so to do. Moreover, as it is shown by plaintiff's testimony that it is only necessary to irrigate his lands three or four times during the season, usually from ten to fifteen days apart, the defendants can only be required to turn the water down to him at those periods.

We think the rule is well settled, upon reason and authority, that if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person or persons may not only appropriate a part or the whole of the residue and acquire a right thereto, as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in the week, or during a certain number of days in a month, then the defendants would be entitled to its use in the other days of the week, or the other days in the month.

The Supreme Court of California, in *Smith v. O'Hara*, have announced what appears to us to be the correct doctrine. "It is usually the case," says the court, "that the amount of water to which the several persons claiming its use are entitled, is measured by inches, according to miner's measurement, or by capacity of the ditches through which it is conducted from the stream, but there is no reason why the amount may not be measured in some other mode. They hold the amount appropriated by them respectively as they would do had the paramount proprietor granted to each the amount by him appropriated. The right to use the waters, or a certain portion of them, might be granted to one person for certain months, days or parts of days, and to other persons for other specified

times. An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year. And so several persons may appropriate the waters for use during any different periods. There is no difference in principle between appropriations of water measured by time and those measured by volume": 43 Cal. 376.

Upon a careful review of the evidence, we are of opinion that plaintiff was negligent in allowing his tenants to use more water than was necessary to irrigate their crops, and also in allowing the water which defendants turned down to him to run to waste when his own crops needed irrigation. By these acts we think he caused the damages which he claims, resulted from his failure to procure a full crop for want of irrigation. We think, although the testimony is not clear, and many of the findings of the court are unsatisfactory and some of them contradictory, that there is a substantial conflict in the evidence to warrant the conclusion reached by the court that plaintiff contributed to his own damage. In entertaining this view of the case, we must not be understood as deciding that defendants were wholly without fault. It is the immediate consequences of the injurious acts that must be regarded in assessing damages, and even if defendants were to some extent in fault (and we think they were) they still had the right to show that the injury of which plaintiff complained was the immediate result of his own negligence, and was not in any way attributable to any act of theirs. Does this finding, however, support the judgment? We think not.

It does not necessarily follow from the language used that plaintiff could not recover. The principles that control this case are not, as counsel assume, analogous to the rules applied in actions brought to recover damages on the ground of defendants' negligence, wherein such a finding sustains the judgment for costs, in favor of defendants, upon the theory that both parties were at fault in producing the injury complained of, and that the plaintiff in the action so contributed to his own damages as to render it impossible for the court to apportion the damages, or to exactly ascertain how much each party contributed. In such actions the rule of contributory negligence

is applied to prevent any recovery by either party. In sustaining the finding we must not be understood as holding that because plaintiff was at fault in allowing the water to run to waste, that his negligence in this respect would authorize or justify the defendants in thereafter withholding from him the amount of water to which he was legally entitled. It was the duty of the defendants every fifteen days, or thereabouts, as plaintiff might need the water, to turn down a sufficient quantity, within plaintiff's appropriation, required to irrigate his lands, provided always, that he was not by other means supplied with sufficient water for that purpose; and if they did not do so, or if plaintiff did not, on account of their wrongful acts, get all the water within his appropriation that was necessary for the irrigation of his crops, then, notwithstanding his own previous negligence, he would be entitled to recover at least nominal damages and costs, with a decree for equitable relief. There is another reason why the judgment can not be sustained upon this finding. Defendants, in their pleadings, deny that plaintiff is entitled to any of the waters of Currant creek except the waters flowing from the springs situate upon the Slaughter ranch, below the lands owned by defendants, and assert an adverse right to all the waters flowing in said creek above said springs. The evidence shows that when defendants allowed the water above said springs to flow down to plaintiff's premises it was as a favor to plaintiff; that when they afterward refused they based their refusal upon the ground that they had better right to the use of the water. This was, in our judgment, such a diversion as by lapse of time might ripen into a prescriptive right; and although plaintiff's crops of grain and vegetables were not actually damaged by the acts of defendants, it was, nevertheless, an injury to plaintiff's rights and entitled him to recover nominal damages, and to an equitable decree declaring the amount of water to which he is entitled.

The rule of law is, that in cases for the diversion of water, where there is a clear violation of a right, and equitable relief is prayed for, it is not necessary to show actual damage; every violation of a right imports damage; and this principle is applied whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation of an adverse right: *Parker v. Griswold*, 17 Conn. 288; *Webb v. The*

Portland Manufacturing Company, 3 Sumner C. C. 189; *Blanchard et al. v. Baker et al.*, 8 Greenleaf (Me.), 253; *Stein v. Burden*, 24 Ala. 130.

The findings of fact by the court are like a special verdict of a jury, and must be taken in connection with the pleadings to support the judgment: *Swift v. Muygridge*, 8 Cal. 445; *Reynolds v. Harris*, 8 Cal. 617. They can not be detached from each other, but must be read together for the purpose of ascertaining their meaning: *Millard v. Hathaway*, 27 Cal. 140; *Kimball v. Lohmas*, 31 Cal. 156; and if there is any conflict or discrepancy between general and specific findings the specific findings must control: *Hidden v. Jordan*, 28 Cal. 302. Applying these principles to the case under consideration, it becomes at once apparent that the judgment rendered by the court was based upon the specific findings that support the pleadings of defendants, which allege that plaintiff's rights are confined to the water flowing from the springs on the Slaght ranch, and for this reason, upon the merits of the case, we are satisfied that the judgment ought to be reversed.

The preliminary objections urged by respondents' counsel are not, in our judgment, well taken. We think the court below was authorized, upon the application for a new trial under the specifications in the sixth subdivision of section 195 of the Practice Act (Stat. 1869, 226), to decide whether the findings sustained the judgment, and that its action in regard thereto can properly be reviewed by this court on an appeal from the order overruling plaintiff's motion for a new trial.¹

The judgment and order appealed from are reversed, and cause remanded for a new trial.

BEATTY, J., concurring.

In this case I concur in the judgment of the court upon the following grounds:

The defendants, by their answers, admit and justify the diversion of the waters of Currant creek above the Slaght springs, asserting that they did not naturally flow down to that point in the bed of the stream, and consequently that plaintiff could have made no appropriation of any waters except those

¹ *Dorr v. Hammond*, 7 Colo. —.

of the springs. They claim for themselves a prior appropriation of all the waters of the creek flowing above the springs. Such being the defense set up, if the plaintiff could prove that the waters of Currant creek did naturally flow down to his premises, that he made an appropriation of the whole or any part of the water flowing from above the Slaght springs prior to any appropriation by the defendants, and that they afterward diverted the whole of the water above the springs at times when he needed it, and by virtue of his appropriation was entitled to it, upon such a showing the court should, at least, have decreed the amount of water that he had first appropriated, enjoined the defendants from any future diversion of so much water, and given him a judgment for his costs, and that—whether he proved any specific amount of damages capable of being exactly assessed or not. But the court, among other findings upon which it bases the judgment against the plaintiff for costs, finds that he contributed to his own damage by not making use of all the water that he might have used. That is to say, the court holds that if a man is deprived of three fourths of the water he is entitled to by the wrongful act of another, he can obtain no relief, legal or equitable, if he has allowed any portion of the remaining fourth to run to waste, because he has thereby contributed to his own damage. It is scarcely necessary to say that the doctrine of contributory negligence has no application to such a case, and consequently that the finding in question is wholly immaterial.

The judgment must, therefore, be sustained upon the other findings if sustained at all. In all the balance of the findings there is but one material fact asserted, and that is, in effect, that Currant creek does not naturally flow down to plaintiff's premises, but sinks above the Slaght springs; all the rest is merely argument to prove this fact or deduction from it, and the finding is opposed to all the testimony in the case. It is, moreover, inconsistent with the other finding, that plaintiff contributed to his own damage; for to say that plaintiff *contributed* implies that the defendants also contributed, and they could only contribute by diverting water which would have flowed down to plaintiff except for their diversion. The motion for a new trial should have been allowed.

Reversed.

INDEX.

ABANDONMENT.

1. *Questions of abandonment and prior location* are peculiarly appropriate to the jury, and where they have been fairly submitted the action of the jury will not be reviewed. *Johnson v. Parks*, 316

2. *Case distinguished from abandonment*.—The case distinguished from one in which the water once diverted is allowed to find its way back to the stream by the natural level of the country so as to indicate an abandonment of it. *Butte Canal Co. v. Vaughn*, 552

3. *Evidence to show abandonment*.—The fact that water was appropriated for a particular purpose, and that the purpose had been fully accomplished, and the further fact that the parties concerned in the appropriation had dispersed to other parts and had given no attention to the ditch for the period of two years, except only to make a sale of it for a nominal sum: *Held*, competent evidence to show abandonment. *Davis v. Gale*, 604

4. *Sale of abandoned water right*.—A sale of a water right by one who has abandoned it will not revive the right secured by his original appropriation. *Id.*

5. *Recaption of abandoned water*.—The prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another. *Barkley v. Tieleke*, 666

See CONVEYANCE, 9; FORFEITURE; ESTOPPEL, 4.

ACCIDENT—See CRIMES, 25.

ADVERSE POSSESSION—See STATUTE OF LIMITATIONS; WATER, 17.

AGENT.

1. *Removing agent, no change of possession*.—The possession of the property of a corporation by its agent is the possession of an agent for his principal, and the removal of such agent and the entry into possession thereof by a new agent is not a change of possession. *Flagstaff Mining Co. v. Patrick*, 19

2. *Agent holds at pleasure of principal*.—It is a general doctrine that an agent holds his authority at the pleasure of his principal, and the only exception to the rule is when the power of attorney held by the agent is coupled with an interest in the property, founded upon a valid consideration. *Id.*

3. *Removal of agents*.—The power to appoint and remove agents and

AGENT. *Continued.*

the managers of the affairs of an incorporation, rests with the company itself and can not be shifted or transferred by any contract made by the board of directors. *Id.*

4. *Contract—Authority of agent.*—The appointment of an agent for a corporation to make a contract for work and labor or service, upon the property of the corporation, need not be made under seal or by resolution of the board of directors, but his authority can be inferred from the admitted relations of the agent to the corporation, or from the course of business of the corporation itself. *Crowley v. Genesee M. Co.*, 71

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AGRICULTURAL CLAIMS.

1. *Mining under crops—California statute allowing miners to enter on agricultural claims.*—The laws of California provide that the possession of public land, containing mines of precious metals, for agricultural purposes, should not preclude the working of such mines by any person desiring to do so, but that such person should give to the occupant a bond of indemnity for any damage which might be sustained by the destruction of growing crops. *Held*, that this law is not liable to any constitutional objection, and a miner who, having first tendered the required bond, enters upon land upon which are growing crops and begins mining operations, can not be treated as a trespasser, but he is liable for the damages occasioned thereby. *Rupley v. Welch*, 243

2. *Mining and agricultural rights under local statute.*—In permitting miners to go upon lands occupied by others for agricultural and grazing purposes, the legislature legalized what would have otherwise been a trespass, and the act can not be extended by implication to a class of cases not specially provided for; *e. g.*, it can not be extended in favor of a ditch for mining purposes. *Burdge v. Underwood*, 517

See DITCH; IRRIGATION; POSSESSION, 3.

AMENDMENT.

1. *Amendment to complaint by permission not disregarded.*—Amendments to a complaint filed by leave of court before the arguments are concluded, will not be disregarded by the Supreme Court if there is nothing in the record to show that counsel for defendant were not present and consenting. Nor does it furnish ground for wholly disregarding the amendments, that the minutes of the clerk show that leave was obtained to file an amended complaint instead of amendments to the complaint. *Reynolds v. Hosmer*, 657

ANNUAL LABOR.

1. *Work necessary to hold a claim.*—The statute requires \$100 worth of work on each claim located after May 10, 1872, in each year, and, in default thereof, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year and before any relocation is made, he thereby preserves his claim. The statute

ANNUAL LABOR. *Continued.*

nowhere authorizes a trespass upon, or a relocation of, a claim before located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim. *Jupiter Mining Co. v. Bodie Co.*, 413

2. *Annual labor by working one of a group of claims.*—Where one person or company owns several contiguous claims capable of being advantageously worked together, one general system may be adopted to work such claims; and work done according to such system for the purpose of prospecting or working all such contiguous claims, although done on only one of such claims, or even outside of all of them, is available to hold all such contiguous claims intended to be worked or prospected by such general system. *Id.*

3. *Labor upon claim by relation and intendment.*—The regulations of a mining district required every claimant to work his claim two days in every ten. *Held*, that efforts to procure machinery, without which it was impossible to work the mine because of the inflow of water, should be justly considered as work done upon the claim, by relation and intendment. *Packer v. Heaton*, 447

4. *Construction of drain.*—Work done upon adjoining ground in the construction of a drain for the mine, is work done upon the claim within the true meaning of a rule requiring labor. *Id.*

5. *Annual labor—Contiguous claims.*—A rule of a mining district in Nevada county, California, reading as follows: "That when two or more separate sets of claims and separate locations lie immediately contiguous to each other, any and all work and labor expended upon any one set of contiguous claims is considered work upon them all, and will hold them all under the unwritten local customs." *Construed* to mean that \$100 in value, or twenty days of faithful labor performed upon one set of claims, is sufficient to hold for one year all the contiguous sets of claims owned by the same party. *Bradley v. Lee*, 470

6. *Annual labor—Contiguous claims.*—The local rule above quoted *held* to mean that the amount of work required to be done must, in the aggregate, be equivalent to twenty days, or \$100 expended for each set of claims located. *Id.*

See FORFEITURE, 2; DISTRICT RULES, 13.

APEX.

1. *Apex on ground of third party—Burden.*—If the apex of the lode in controversy is upon the claim of one not a party to the suit, the plaintiffs can not recover. The burden is upon the plaintiffs to show that the lode is in their ground, that they have the apex of it, and that it extends in well defined boundaries from their territory into that of the defendants. *Leadville M. Co. v. Fitzgerald*, 380

See LOCATION, 11.

APPROPRIATION.

1. *Extent of appropriation—Question for jury.*—The extent of the

APPROPRIATION. *Continued.*

right acquired by an act of appropriation, or the extent to which subsequent acts of appropriation are subordinate to it, is a question of fact for the jury. *Nevada Water Co. v. Powell*, 254

2. *Rights of subsequent appropriators of water.*—Priority of appropriation where no other title exists, undoubtedly gives the better right. All the rights of all subsequent appropriators are subject to his who is first in time. The subsequent appropriator only acquires what has not been secured by those prior to him. But what he does thus secure is absolute and perfect, and his right is to be determined by the condition of things at the time he makes his appropriation. *Proctor v. Jennings*, 265

3. *Conflicting mining and water claims—Prior appropriation controls.*—By the customary law of miners in California, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. *Jennison v. Kirk*, 504

4. *Prior appropriation.*—If the ditch owner divert the natural water of the stream as well as that brought into it by him, then the prior appropriator would have a cause of complaint. *Hoffman v. Stone*, 520

5. *Subsequent locators above and below.*—The first appropriator of water should be protected in his rights, as well against subsequent locators above as below him. He who has first diverted the waters of a stream and appropriated them to his own use is entitled to the exclusive enjoyment of the same, pure and undiminished. The use of the water by subsequent locators above him must be reasonable and the injury or diminution small or inconsiderable. *Hill v. King*, 533

6. *Rights of prior appropriator.*—The first appropriator of the water of a stream passing through the public lands in the State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters, and divert an equal quantity as often as they choose. *Butte Canal & D. Co v. Vaughn*, 553

7. *Effectuality of appropriation.*—The right secured by priority of appropriation, though not founded upon a legal title, should be regarded as perfect as if secured by prescription or express grant; the exercise of the right does not depend on the source of the right. *Kidd v. Laird*, 571

8. *Change in use or place of user.*—A party acquires a right to a given quantity of water by appropriation and use, and he loses the right by non-use or abandonment. Appropriation, use and non-use are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey

APPROPRIATION. *Continued.*

it and for any useful and beneficial purpose to which he may choose to apply it. *Davis v. Gale*, 604

9. *Prior appropriation—Ditch and mining claim.*—The case of conflict between a ditch and a mining claim is peculiar. The rule of prior appropriation can not be strictly applied. The governing maxim is rather *sic utere tuo ut alienum non lædas*. And it may be doubted whether a ditch, although recognized as real estate, is to be regarded with the same favor by a court of equity. *Clark v. Willett*, 629

10. *Insufficient diligence in constructing ditch lets in interveners.*—Defendants' grantor, in 1858, constructed a ditch from the Carson river to Dayton, a distance of four and one half miles; in 1859 and 1860 plaintiff's grantors tapped the river below the head of the Dayton ditch; in 1864 the Dayton ditch was finally enlarged to much greater capacity and so as to interfere with the supply to plaintiff's ditch—this enlargement of the Dayton ditch having been contemplated since 1858, but the work not prosecuted with diligence between 1858 and the time when the rights of the plaintiff's grantors accrued. *Held*, that the plaintiff's ditch had the appropriation prior to the enlarged ditch. *Ophir Mining Co. v. Carpenter*, 640

11. *Facts not amounting to reasonable diligence.*—The cleaning of the old ditch in 1859, with the enlargements in places, but not so as to increase the capacity of the ditch to any greater scale, no labor toward enlargement in 1860, but little except repairs in 1861 and 1862 and no definite effort to increase the capacity of the ditch, with expenditures commensurate to the undertaking until 1863 and 1864, was not sufficient diligence to hold the ditch as enlarged against an undertaking which had been vigorously prosecuted shortly after the completion of the original ditch. *Id.*

12. *Date of appropriation.*—Where the work of appropriation is not prosecuted with diligence, although finally completed, the appropriation is dated from the completion, and not from the original commencement of the enterprise. *Id.*

13. *Relation.*—Priority of appropriation gives the better right to the use of running water when the right itself springs from appropriation and not as an incident of ownership of the soil; and where labor is required to complete the appropriation a reasonable time is allowed for such labor, and if complete within such reasonable time the appropriation is considered as relating back to the first act done by the locator. *Id.*

14. *Measurement of water appropriated.*—The quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at its smallest point, that is, at the point where the least water can be carried through it. *Id.* 653

15. *Appropriation of water.*—Where the right to the use of running water is based upon appropriation and not upon ownership in the soil, the first appropriator has the superior right. *Barnes v. Sabron*, 673

16. *Limits to appropriation—Test of ditch capacity.*—If the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irri-

APPROPRIATION. *Continued.*

gation, for watering his stock, and for domestic purposes; but if the capacity of his ditches is not more than sufficient for those purposes, then, no change having been made in the ditches since constructed, and no question of the right of enlargement being involved, he must be restricted to the capacity of his ditches at their smallest point. *Id.* 674

17. *Division of water by intervals of time.*—If A has appropriated water during certain days in the week, or during a certain number of days in the month, B may appropriate it and become entitled to its use on the other days of the week or month. *Id.* 675

18. *Prior and subsequent appropriation.*—The first appropriator of water has the right to insist that the water flowing in the stream appropriated, during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use, but others have the unquestionable right to appropriate the remainder of the water running in the stream. *Barnes v. Sabron,* 673

See ABANDONMENT, 1; DAM; DILIGENCE; DITCH; IRRIGATION, 1; EVIDENCE, 8; WATER.

ASSIGNMENT.

1. *Payment to assignee.*—The holder of a contract assigned generally to him as collateral security for a debt has the right to receive the payments to be made on the same; and the payer is not bound to limit his payment to the amount secured; any payment beyond such amount would become a debt from the assignee to the assignor. *Myers v. South Feather R. W. Co.,* 566

2. *Assignee may elect.*—The assignee of a contract may exercise a right of election or option therein contained. *Id.*

ATTORNEY.

1. *Power of courts to pass upon authority of attorney.*—The defendants' attorney appearing on behalf of one of the plaintiffs, J., who was present in court, moved to discontinue the suit as to him, and presented an affidavit by J. that the suit had been brought without his consent and against his wish. Plaintiffs' counsel resisted the motion on the ground that the court had no power to inquire into his authority to appear for J. *Held,* that attorneys are the officers of the court; they appear and participate in its proceedings by the license of the court, and if they undertake to appear without authority from the party whom they profess to represent, the act is an abuse of the license of the court, which upon the application of the supposed client, the court has the power to inquire into and correct summarily. *Clark v. Willett,* 628

BOND—See CORPORATIONS, 34.

BOUNDARIES—See DISTRICT RULES, 12; LOCATION, 5, 6.

COAL—See DELIVERY, 3; LEASE, 4.

COLOR OF TITLE—See CRIMES, 24.

CONFUSION.

1. *Burden of proof.*—The burden of proof rests upon the party causing the mixture. He must show clearly to what portion he is entitled. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. *Butte Canal & D. Co. v. Vaughn*, 552

CONSPIRACY—See CRIMES, 1, 2.

CONSTITUTIONAL LAW—See CORPORATIONS, 12.

CONTRACT.

1. *Cheating by oversizing the measure for weight wagons.*—Upon bill to redeem a colliery which had been first leased and then mortgaged, plaintiff alleged: 1. That defendant had not left sufficient pillars; and, 2. That he, having to pay by the ton, made his wagons of a larger size. The court left him to his remedy in damages upon the first item, but as to the oversize of the wagons, directed an issue at law. *Brandling v. Owen*, 129

2. *Proviso deferring right to suit after breach.*—Where there is a covenant to pay money by a certain day, with a *proviso* that no action shall be brought till after the expiration of a month, the action is premature if brought within the month. *Foley v. Fletcher*, 130

3. *Contract to pay royalty—Affidavit of defense—Practice.*—Articles of agreement in which a party agreed to mine on the land of the other party and take out 8,000 tons per annum, and pay therefor fifteen cents per ton, is not "an instrument of writing for the payment of money" requiring an affidavit of defense, where the action is covenant for damages for non-performance; otherwise, if the suit had been for the agreed rate for any certain number of tons mined. *Eshelman v. Thompson*, 146

4. *Evidence of condition of shaft.*—In suit on contract for sinking a shaft, it appeared that the shaft was finished on the 20th of November. Evidence was offered by defendant to show the condition of the shaft, in January following, the shaft meanwhile being full of water. *Held*, that the evidence was properly rejected. *Eureka Coal Co. v. Braidwood*, 148

5. *Formal acceptance not necessary.*—If a shaft be sunk according to contract, it is the duty of the party procuring the work to accept it, and the party sinking can not be prejudiced by the neglect of a formal acceptance thereof. *Id.*

6. *Reasonable time for examination.*—Where work is to be accepted or rejected, the examination should be made when the work is tendered or within a reasonable time thereafter. *Id.*

7. *Mining statute—Special contract.*—The statute of Wisconsin governing the rights of miners, applies only where there is no special contract or lease fixing the rights of the parties. *Sobey v. Thomas*, 360

8. *Ratification defined.*—The term "ratified," when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another; it implies the relations of principal and agent. *Ellison v. Jackson Water Co.*, 559

9. *Contract to pay in water.*—Defendant employed plaintiff to build a ditch, at the rate of \$3 per rod, one third payable in money at the comple-

CONTRACT. *Continued.*

tion of each mile and two thirds by the delivery of water, the company having the right to pay all cash instead of partly in water if they preferred. *Held*, that if they elected to pay such two thirds in cash it did not become due in installments, like the one third, but upon the completion of the ditch. *Myers v. South Feather River W. Co.*, 566

10. *Idem.*—The payments in water could not be claimed before the ditch was completed, and the cash can not be required sooner. *Id.*

See CORPORATION, 1; DELIVERY; AGENT, 4.

CONVEYANCE.

1. *Notice of covenant in title papers.*—The law conclusively charges the purchaser of lands with knowledge of a covenant in the deeds, which constitute the muniments of his title, that no marl should be sold from off such premises. *Brewer v. Marshall*, 119

2. *Rights incident to land enforced against purchaser with knowledge.*—Cases reviewed, illustrating the principle of preventing the alienee of lands, having knowledge of the just rights of another, from defeating such rights, aside from the existence of an easement or covenant adhering to the title. *Id.*

3. *A proviso in the same deed with the covenant qualifies and controls the covenant.* *Foley v. Fletcher*, 130

4. *Separate location on same lode—Conveyance of lode held under different names.*—Plaintiff derived title to the premises in controversy from D., to whom defendant had conveyed by deed containing the following description: "All that portion of the claim known as the Ward Beecher, commencing at the south side and east end of a long cut running easterly and westerly, generally known as the Ward Beecher Cut. Also all my right, title and interest in the Montrose, Colfax and Barris & Sproul lodes, lying south of a due east and west line drawn from the south side and east end of the above mentioned cut," etc. The plaintiff conceded that nothing was conveyed by the deed under the name Ward Beecher, on account of incurable defects in that portion of the description, but that the Colfax was the same as the Ward Beecher, and was sufficiently described to convey the premises; the defendant disputed the identity of the veins, but claimed that if the same, the Colfax location was a nullity, and nothing passed by a conveyance under that name. *Held*, that where two interfering claims have been made upon the same vein and are held by the same party, the deed of the one will convey the other to the extent of the ground covered by both locations, without regard to their being located and known by separate names, and if it can be ascertained what lode is intended to be conveyed, it makes no difference that it has been called by a name illegitimately acquired. *Philpotts v. Blasdel*, 341

5. *Deed—Statute of uses—Party plaintiff in ejectment.*—A deed in which R. grants, bargains, sells, remises, releases, conveys and quitclaims the premises to P. for the use and benefit of the E. & A. M. Co. *Held*, to be a deed of bargain and sale, and that the legal title remained in P. because no use can be limited on a use, and when a man bargains and

CONVEYANCE. *Continued.*

sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant and therefore void; but though not a use which the statute can execute, yet still it is a trust in equity, which in conscience ought to be performed. *Held, also*, that P. rather than the E. & A. M. Co. was the proper party to bring ejectment for the premises conveyed. *Id.*

6. *Conveyance not under seal—Evidence.*—A mining claim may be conveyed by bill of sale or instrument in writing not under seal as provided by statute in California, and such instrument is admissible in evidence. *St. John v. Kidd.* 455

7. *Bill of sale as evidence.*—It was objected to the introduction of a bill of sale in evidence, that it purported to be executed by Jones, one of the three grantors, by his attorney in fact, who, it was shown, had at the time a written power, which was not produced at the trial. *Held*, that the objections pertained, not to the admissibility of the bill of sale, but to its effect when admitted; and that it was proper evidence to show a conveyance by the other grantors. *Id.*

8. *Conveyance of water.*—A water right is, under the law of Montana, "such a species of realty" as to require for its transfer the same form and solemnity as the conveyance "of other real estate." *Barkley v. Tieleke.* 666

9. *Void Deed—Abandonment—Appropriation.*—Where the owner of a ditch attempts to convey the same by a deed which is void, but places the grantee in possession, who continues to use the ditch, it operates as an abandonment of his appropriation by the grantor and as a new appropriation by the grantee, dating from the change of possession. *Id.*

See DESCRIPTION; EASEMENT, 2; LOCATION CERTIFICATE; RELOCATION, 1; TENANTS IN COMMON, 1.

CORPORATION.

1. *Director may deal with corporation same as stranger—Deed of trust.*—A director or stockholder of a private corporation may trade with, borrow from, or loan money to the company of which he is a member, on the same terms and in like manner as other persons; but where a director loans money to his corporation, taking a deed of trust to secure the same, he must act fairly, and be free from all fraud and oppression, and if in so doing he acts for the interest of the company, and imposes no unfair or unreasonable terms, the security may be enforced the same as if given in favor of any other person. *Hart's v. Brown.* 1

2. *Relation of director to company when purchasing its bonds or property.*—The managers or directors of a private corporation are not trustees of its property in such a sense as to disable them from purchasing the property and stock belonging to it, with the same effect as though they were not managers or directors. They have the right to purchase the bonds or other indebtedness of the company. *Id.*

3. *Idem—Purchase at foreclosure not in good faith, if company able to redeem.*—Where a corporation has money, or assets convertible into money, the purchase of its bonds or lien indebtedness by directors as a means of enforcing sale of its property would be in bad faith, and the title thus acquired would not be sustained in equity. *Id.*

CORPORATION. *Continued.*

4. *Duty of directors to dispose of remaining assets after loss of its substantial property.*—Where the essential and principal property of a mining company is sold under a trust deed securing its bonds, the company still owing other debts, it becomes the duty of the directors to dispose of the remaining property, and it may be so disposed of under the trust deed after sufficient has been realized under its foreclosure to pay the bonds secured. *Id.*

5. *Proof of organization or charter.*—To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown. *Abbott v. Omaha Co.*, 8

6. *Filing articles.*—In Nebraska, the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and articles so filed, taken together, are considered in the nature of a grant from the State, and constitute the charter of the company. *Id.*

7. *Distinction between liability for no report and false report.*—Assuming that, under the laws of New York, causes of action against the trustees of a corporation for omission to file an annual report, and for making and filing a false report, may be united in one complaint, and that a false report may be regarded as no report, yet, to justify such union, each cause of action must affect all the parties. For the omission, all the trustees are liable. For the false report, only those are liable who do the act. *Bonnell v. Griswold*, 15

8. *Powers of board of directors.*—When by the articles of incorporation it is provided that the board of directors shall have power to appoint and remove the agents of the corporation, the power thus given is a trust reposed in the directors alone, and they are not at liberty to enter into any agreement by which such power is surrendered to a stranger. *Flagstaff M. Co. v. Patrick*, 19

9. *Ultra vires.*—A corporation is not bound by an unauthorized contract made by its board of directors; such contract can be treated as *ultra vires*, and is not binding upon the corporation. *Id.*

10. *Personal liability of stockholder.*—*Value of lands used to pay up stock, inquired into.*—In an action to charge the holder of stock of a corporation, issued for the purchase of property, individually, with the debts of the company under the laws of New York, it appeared that the entire capital stock of the corporation, \$300,000, was issued to H., one of the trustees, in consideration of the assignment to the company of two executory contracts on which nothing had been paid—one for furnace property at \$30,000, and one for woodland at \$10,000. H., without consideration, reconveyed to the company 600 shares, the par value being \$10 per share, to be sold to pay the contract price of the furnace property, and 1,000 shares to be sold to raise working capital, of which defendant purchased 250 shares at forty cents on the dollar, he having participated in the whole transaction as a trustee of the company. *Held*, that to justify a recovery it is not sufficient to prove an error of judgment by the trustees in the valuation of the property, but that it must be shown that the pur-

CORPORATION. *Continued.*

chase at the price agreed upon was in bad faith and to evade the statute; and the facts in this case were sufficient to justify such a finding of fraud. *Held, also*, that evidence of the value of the property purchased was competent. *Douglass v. Ireland*, 33

11. *Idem*—*Simultaneous action against trustees*.—An action brought against the trustees to charge them under the laws of New York with the same debt, because of failure to make the annual report, is no bar to an action against stockholders based on their personal liability. *Id.*

12. *Constitutional law—Conditions imposed upon foreign corporations*.—Section 213, Gen. Laws, requiring foreign corporations, before they shall be permitted to do business in Colorado, to file a certificate with the Secretary of State, etc., is designed to enforce the provision of the State Constitution requiring foreign corporations to have a known place of business, and an authorized agent in the State, upon whom process may be served, before doing business therein, and is not in conflict with the Constitution of the United States. *Utley v. Clark-Gardner M. Co.*, 139

13. *Foreign corporation may sue without filing certificate*.—Upon suit brought by a foreign corporation a special plea was filed setting up that plaintiff had not complied with the foregoing provision, and a demurrer to the plea was sustained. Defendants stood by their plea, and the Supreme Court, affirming the judgment, *held* that a corporation is a creature of local laws, and has no absolute right of recognition outside of the limits of the sovereignty which created it; beyond such limits it is dependent upon the comity of the several States, and its rights must be enforced under such limitations as each State may think wise to prescribe; but that the bringing of suit is the seeking to enforce rights springing from business transactions, and is not the doing of business so as to require the filing of the above certificate. *Id.*

14. *Recovery by director for extra services*.—A president or director of a corporation rendering services to the corporation outside the scope of his official duty and not required thereby, may recover compensation therefor upon a promise implied from facts and circumstances. *Santa Clara Mining Ass. v. Meredith*, 44

15. *Preferred stock, when illegal*.—By a special charter the Q. M. Co. was granted authority to issue certificates of stock representing the value of its property, in such form and subject to such regulations as it might by its by-laws prescribe. Pursuant to this authority, the company adopted the following by-law: "Certificates of stock amounting to \$10,000,000 shall represent the value of the property of the corporation, and the capital stock shall be divided into 100,000 shares of \$100 each." After the stock had been issued, and at an annual meeting of the stockholders, by vote of the majority of the stock, the above by-law was amended by adding the words: "Certificates of stock upon which five dollars shall be paid, shall be distinguished as preferred stock," and by other by-laws and resolutions it was provided that preferred stock should be entitled to seven per cent. out of the net earnings each year, and any surplus of earnings should be divided *pro rata* among the holders of preferred and common stock, and that the preferred stock should be issued to all holders of com-

CORPORATION. *Continued.*

mon stock who surrendered the same, share for share, upon the payment of five dollars per share. 42,913 shares were so surrendered and preferred stock issued in lieu thereof, and for four years both preferred and common stock were quoted in the public prints and sold at the stock exchange, the former bringing the highest price. At the expiration of this period actions were brought to have a judicial declaration that the creation of the preferred stock was unauthorized. *Held*, that the by-law quoted, when adopted, was as much the law of the corporation as if it had been a provision of the charter, and it entered into the compact between the corporation and every taker of a share, so that a division of the stock into the two classes could not be made without the consent or acquiescence of the owners, but that in this case, the owners were chargeable with notice of the issuance of the preferred stock, and having acquiesced therein, they were bound by it, at least as against purchasers of stock in the open market; and as it was impracticable to cancel a portion of such shares without canceling all, none of it would be so treated. *Kent v. Quicksilver Mining Co.*, 47

16. *Stockholders, how affected by acts ultra vires.*—Acts of a corporation which are not *malum in se* but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them dealing in good faith with the corporation will be protected in a reliance on such acts. *Id.*

17. *Sale of corporate bonds by agent—Application of purchase money.*—Where a corporation places its bonds before maturity in the hands of an agent with power to negotiate them, a purchaser may presume that the agent is acting within the scope of his authority, and is not bound to inquire into the application made by the agent of the proceeds of the sale. But if the purchaser is informed or has notice of intended misapplication before purchase, he buys at his peril. *Chew v. Henrietta M. Co.*, 67

18. *Validity of incorporation—Omission in certificate.*—As a general rule it is quite well settled that the validity of the existence of a corporation can not be questioned collaterally. The omission from the certificate of incorporation of the latter clause in section ninety-three of the incorporation act, as to the assessability of the stock of a mining corporation, can not, in the absence of fraud, be regarded as essential to the corporate existence in an action by one against the individual members upon a contract with the company. *Humphreys v. Mooney*, 76

19. *Individual liability of incorporators.*—No provision is made by which individual liability attaches to members of a corporation by reason of any omission to organize in the manner prescribed by the incorporation act. *Id.*

20. *Non-resident incorporators—Filing certificate.*—The statute does not require that the incorporators or officers shall be residents of the State, nor that the certificate of incorporation be executed within the limits of the State; nor does the statute in terms require a meeting of the incorporators prior to the execution of the certificate; such execution under the statute is analogous to the execution of a deed of conveyance, and is of no validity without delivery. It is the filing of the certificate that brings the corporation into existence. *Id.*

CORPORATION. *Continued.*

21. *Meeting of directors out of State.*—Under the Colorado statute meetings of directors may be held beyond the limits of the State, if provision therefor be made in the certificate of incorporation. *Id.*

22. *Stockholders meeting out of State—Collateral attack.*—The annual meeting of the stockholders for the election of directors without the State, although irregular and illegal, can not be taken advantage of in a collateral proceeding by either the corporation, or one contracting with it as such. *Id.*

23. *Directors by operation of law.*—The persons who are named by the incorporators in the certificate as directors for the first year are created such directors by operation of law, and not by election of the stockholders after the corporation is formed. *Id.*

24. *Failure to file duplicate certificate.*—While a failure to record a duplicate of the certificate of incorporation in the county where the operations of the company are carried on may be such a non-compliance with the law as would authorize the people to sustain a writ of *quo warranto* or *scire facias*, and to oust the corporation from the exercise of their franchise, yet it does not follow that as to third persons it is not a corporation. *Id.*

25. *Premature action of organizers.*—The organizers of a corporation can not, by their action before the completion of the incorporation and the election of directors, dispose of the future earnings of a corporation, or control the action of the directors to be elected. *Coyote Gold & Silver M. Co. v. Ruble*, 88

26. *Premature assessments.*—Stock can not be assessed before the election of the board of directors. *Id.*

27. *Election of directors.*—The election of directors is a condition precedent to the perfect organization of a corporation (under Oregon statute), but it may, before such election, become the holder of property. *Id.*

28. *Contracts of organizers.*—Contracts of the organizers do not bind the corporation unless adopted or ratified by it upon the perfection of its organization. *Id.*

29. *First existence of corporation.*—A corporation exists as a legal entity from the time of the filing of its articles. *Id.*

30. *An agreement to subscribe for stock* does not amount to a subscription, nor does such agreement authorize the secretary of the company to place the signers' names among the list of stockholders. To bind a party as a stockholder he must directly subscribe for stock or authorize a subscription on his account. *Id.*

31. *Placer claims worked by same water.*—R., one of the prominent organizers, purchased, with his own money, claims which were to be transferred to a mining company; and also other claims so situate as to prevent the proper working of the company's claims. *Held*, that upon tender, he must convey all such claims to the company even if he had not become finally bound as a subscriber to the company. *Id.*

32. *Bona fide stockholder—Void election.*—At a meeting of stockholders for the election of trustees, 1,000 shares were represented by a person to

CORPORATION. *Continued.*

whom the stock had been issued as trustee, without the consent or knowledge of the owners. Without him a majority of the stock was not represented at the meeting. *Held*, that he was not a *bona fide* stockholder within the meaning of § 312, Code of Civil Procedure, and that the election was void. *Stewart v. Mahoney Mining Co.*, 108

33. *Power of directors beyond limits of State.*—The directors of a corporation, unless forbidden by its charter, or the general laws of the State from which it derives its existence, may perform all except strictly corporate acts outside of the limits of such State, as well as within them. The directors of a Pennsylvania corporation at a meeting in the city of New York may authorize the president and secretary to make a trust deed and issue bonds. *Bassett v. Monte Christo M. Co.*, 108

34. *Bonds issued to directors—Stranger can not complain.*—Bonds regular upon their face, issued by a corporation, but really for the benefit of the directors who authorized their issuance, are not void, but only voidable at the election of the corporation or its stockholders, and if they do not complain, a stranger, a subsequent creditor, can not. *Id.*

See EVIDENCE, 1; INJUNCTION, 1; MORTGAGE, 1-3; PARTNERSHIP, 1-2.

COVENANT.

1. *Incidents annexed to land—Contracts in restraint of trade.*—A covenant by the vendor of real estate that neither he nor his assigns will sell marl from off a tract adjoining the demised premises, will not be enforced in equity against the purchaser of such tract, because, 1. On the same principle incidents could be annexed to the land, as multiform as human caprice. 2. It is a plain contract against trade and traffic. *Brewer v. Marshall*, 119

See CONVEYANCE, 1, 3; LEASE, 1, 5.

CRIMES.

1. *Conspiracy to prevent work.*—An indictment for conspiring "to prevent the workmen of J. G. from continuing to work," does not require evidence of conspiracy to prevent *all* the workmen from continuing to work. *Rex v. Bykerdike*, 161

2. *Indictable offense.*—A combination of workmen for the purpose of dictating to masters what workmen they shall employ, is indictable. *Id.*

3. *Violence against laborers accepting under-rate wages.*—Every man has the right to work for the best price he can get; but if others choose to work for less than the usual price, the law will not permit violence to be used against them or those by whom they are employed. *Rex v. Batt*, 162

4. *Riot—"Beginning to demolish"*—A party of coal whippers, having malice against a coal lumper who paid less than the usual wages, created a mob, and riotously went to the inn where he kept his pay-table, made threats against him, began to throw stones and break windows and partitions, and continued this mischief against the house until he himself had escaped. *Held*, that they might be convicted of "beginning to de-

CRIMES. *Continued.*

molish " the house if it was, their intent to demolish it, even although their principal object was to injure the lumper. *Id.*

5. *Larceny—Taking ore from fellow miners' heaps.*—It is not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners, ore produced by them and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owners. *Rex v. Webb*, 166

6. *Closing airway under mas'er's orders.*—Workmen stopping up an airway into an adjoining colliery, by order of their employer claiming the ownership and the right to close it, are not liable under the statute for malicious mischief; otherwise would be the case of doing an act *malum in se*, in which case the order would be no justification. *Regina v. James*, 168

7. *Indictment for manslaughter must allege duty and breach.*—Where an engineer, who had charge of an engine which was worked for the purpose of keeping up a supply of pure air in a mine, neglected his duty so that the engine stopped and the mine thereby became charged with foul air, which afterward exploded and killed one of the miners. *Held*, that such engineer could not be convicted of manslaughter on an indictment which did not allege a duty in him which he had neglected to perform. *Regina v. Barrett*, 171

8. *Manslaughter, by negligence.*—If it be the duty of a person, as ground bailiff of a mine, to cause the mine to be properly ventilated by causing air headings to be put up where necessary, and by reason of his omission in this respect another be killed by an explosion of fire damp, such person is guilty of manslaughter, if by such his omission he was guilty of a want of ordinary and reasonable precaution; and if it was his plain and ordinary duty to have caused an air heading to have been made, and a man using ordinary diligence would have done it. *Regina v. Haines*, 174

9. *Other parties negligent at same time.*—It is no defense in a case of manslaughter that the death was caused by the negligence of others as well as of that of the prisoner. In such a case the prisoner and the other parties are all guilty of manslaughter. *Id.*

10. *Crime committed through second party.*—If a man, by means of an innocent agent, do an act which amounts to felony, the employer and not the agent is accountable for that act. *Regina v. Bleasdale*, 177

11. *Stealing coal from many owners by secret mining through common shaft.*—Where a prisoner was indicted in one count for stealing from the mine of one G., coal, the property of said G., and in the same count for stealing from the mines of thirty other proprietors, and it appeared that all the coal so alleged to have been stolen had been raised at one shaft, it was *held*, 1. That the prosecutor could not be called upon to elect on which charge he would go to the jury. 2. That although for the sake of convenience in trying the prisoner, the judge might direct the jury to confine their attention to one particular charge, yet that the prosecutor was entitled to give evidence in support of all the charges laid in

CRIMES. *Continued.*

the indictment. 3. That proof of each aided the other on the question of felonious intent. *Id.*

12. *An act of omission*, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter. *Regina v. Lowe*, 180

13. *Manslaughter—Deserting the engine.*—Where a man appointed to superintend a steam engine in a colliery for the purpose of raising colliers from the pits, left the engine in the charge of an incompetent person, in consequence of which one of the colliers was thrown down the shaft and killed. *Held*, that the man so leaving the engine was guilty of manslaughter. *Id.*

14. *Manslaughter, through neglect.*—Deceased, with others, was walling a shaft in a colliery. It was the duty of the prisoner to place a stage on the mouth of the shaft, and the death was the direct consequence of his negligent omission to perform such duty. *Held*, that defendant was rightly convicted of manslaughter. *Regina v. Hughes*, 182

15. *Elements of manslaughter, through negligence.*—That which constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. *Regina v. Hughes*, 182

16. *Larceny of ore—Time between severance and asportation.*—The severance and asportation of ore must be so separated as not to constitute one continuous act, to constitute the crime of larceny. The time between the act of severance and the act of asportation need not be "at least one day," but there must be such an intervention of time as will constitute them several transactions. *People v. Williams*, 185

17. *Indictment for larceny of quartz—Duplicity—No implied severance.*—An indictment charging that the defendant "did unlawfully and feloniously take, steal and carry away from the mining claim of the B. M. Co. * * * fifty-two pounds of gold-bearing quartz rock, the personal property of said B. M. Co., of the value of four hundred dollars," does not sufficiently imply a severance from the realty. It is capable of a double interpretation. The property taken should be so described as to enable the court to decide for itself whether the property is "personal goods." *Id.*

18. *Nugget.*—A nugget of gold, separated from the vein by natural causes and found loose upon the surface, is parcel of the realty, and when taken and carried away by one continued act, it is not larceny. *State v. Burt*, 190

19. *Mail carrier embezzling bag of gold dust.*—A defendant can not be convicted under § 12, Act of 1864, when it is not charged that the gold was contained in a letter or packet of letters, and there is no count averring that he secreted, embezzled or destroyed any bag of letters containing the gold dust. Under that section, he can not be convicted of a mere embezzlement of gold dust. *Farnum v. United States*, 192

20. *Trespass and larceny of ore distinguished—Lapse of time.*—If ore be severed from a ledge and feloniously removed without the intervention of any time, there is no larceny, but one continuous act which consti-

CRIMES. *Continued.*

tutes only a trespass, but to constitute larceny it is not necessary that any particular time should elapse between the severance and the carrying away. *State v. Berryman*, 199

21. *Extortion—Land office.*—The register of the United States land office can not act as an attorney for an applicant for patent to mineral land; and if he receive from such applicant a gross sum in part as his official fee, in part as charge for services as an attorney, such receipt of money is extortion. *United States v. Waitz*, 205

22. *Larceny as bailees—Conversion of receipts for oil in store.*—B. was the owner of several hundred barrels of oil in the pipes or tanks of the Union Pipe Line, for which he had two accepted orders on said company. B. delivered these orders to the firm of H. & B., oil dealers, and took from them a receipt, the terms of which were that the oil was to be held for storage at five cents a barrel per month. At the time of the delivery of the accepted orders to H. & B., the oil was in the tanks or pipes of the Pipe Line, and undistinguishable from the other oil therein. H. & B. deposited the orders to the credit of their general account with the Pipe Line, and thereafter deposited and drew until they became embarrassed, and to meet their engagements, continued to draw on their balances on the books of the company until they failed. B. demanded the oil, and H. & B. were unable to deliver it. *Held*, that the delivery of the accepted orders was a delivery of the oil, and constituted a bailment, and the defendants having converted the oil to their own use, the conversion was fraudulent, and they were guilty of larceny as bailees. *Hutchison v. Commonwealth*, 208

23. *Charging sole corporator, as owner.*—When a corporate ditch is under the control of one who is the sole corporator in the company the property may be laid and proved as the property of such person. *Castleberry v. State of Georgia*, 224

24. *Pretense of title, without color, as a defense.*—To justify breaking a ditch in another person's possession under claim of right, a mere assertion of title will not suffice; at least some apparent or probable right must be proved. *Id.*

25. *Accident in mine—Whose duty to report.*—Under section 9 of Ch. 93, Rev. Stat., 1874, relating to mines, as amended by the act of May 11, 1877, the person whose duty it is made to report any accident in any mine or colliery causing loss of life or serious personal injury, to the mine inspector, etc., and upon whom a fine is imposed for neglect of such duty, is the one who has the immediate personal charge of the mine or colliery. The owner and operator of the mine or his agent is not within the penalty, unless he has the personal charge of the mine. *Adam Sholl v. People*, 228

See INDICTMENT.

CUSTOM.

1. *Evidence of custom in other mining districts.*—The rule of law excluding evidence of custom in neighboring manors has been varied in "mine countries, Derbyshire, etc.," to admit evidence to explain or cor-

CUSTOM. *Continued.*

roborate the custom of the manor in question, and the same exception was in this case extended, by analogy, to the custom of digging turf.

Dean and Chapter of Ely v. Warren, 233

2. *Custom and prescription distinguished—Profit a prendre.*—A custom gives a right local to a district or community; prescription is a right attaching to the person or to a particular estate. *Perley v. Langley,* 235

3. *Whether rights are held as a custom or as a prescription depends* upon whether they are held as a local usage, or, *contra*, as a personal claim, or as dependent on a particular estate. *Id.*

4. *All rights which may be held under a custom* may be held by prescription, but the reverse of this is not true. *Id.*

5. *A profit in another's land* must be established as a prescription by the individual through his ancestors, or a corporation and its predecessors, or as appurtenant to some estate held by the claimant. *Id.*

6. *No precedent for custom to take the soil.*—There are no authorities that sustain the removal of the soil, or the taking of profits from the soil of another, as a custom. *Id.*

7. *Workings—Judgment of mine owner not to be questioned.*—It is not within the province of a court to question the judgment of the owner of a mining claim, or to determine whether one mode of use would be more beneficial than another; such ruling applied to the case of working a claim by a dam and flooding claims above, a local custom so to work having been established. *Stone v. Bumpus,* 278

See DISTRICT RULES.

DAM.

1. *Nuisance—Mandatory injunction lowering dam.*—Where defendants erected a dam which overflowed plaintiff's placer claim with the water of the mill pond. *Held*, a nuisance, and that the proper decree should order a reduction of the dam such number of feet as would remove the overflow, with a perpetual injunction to restrain the raising of the dam above such point. *Rimsey v. Chandler,* 240

2. *Injunction restraining diversion of water.*—R. was in possession of a tract of public land on which was a garden and fruit trees, and for the purpose of irrigating them, he constructed a reservoir to receive the water flowing down a ravine on the premises. W. entered upon the premises, and began digging and sluicing for mining purposes, and threatened to divert the water from the reservoir. *Held*, that R. had a vested right in the water by virtue of his prior appropriation, and that the diversion of the water from the reservoir should be restrained by injunction. *Rupley v. Welch,* 243

3. *Deed of water, below mill.*—A deed granting the right "to flow back the water to the foot of the present overshot wheel of the mill, and to use all the water which naturally flows below said mill." *Held*, to mean the water as it flows from the mill, after use by the mill. *Oregon Iron Co. v. Trullenger,* 247

4. *Right to raise dam, as affected by rights of intervening claimants above.*—Where a party has appropriated the waters of a stream for ditch

DAM. *Continued.*

purposes by means of a dam, and afterward the stream becomes so filled with tailings from workings above, that it becomes necessary to raise the dam to secure the water, it does not follow that he has the right so to raise the dam because of such unforeseen changes in the condition of the stream. *Nevada Water Co. v. Powell*, 253

5. *Idem.*—If such further act of appropriation cause injury to intervening appropriations, such intervening appropriations must be considered as prior thereto; the party attempting to raise such dam can not do so upon the ground of its being a necessity, in order to secure only the full extent of his original appropriation. *Id.*

6. *Idem.*—The appropriation carried with it the right to erect all works necessary to the enjoyment of the water; but that appropriation being complete and acted on, subsequent locations could be made by others based upon the extent of that established appropriation "unless there was something which manifested a further right." *Id.*

7. *Upper and lower dams—Effect of booming—Damnum absque injuria.*—In 1865 A built a dam and mill upon a certain stream; afterward B built another dam about 155 feet below the mill-wheel of A, which lower dam of B, however, at the time when constructed and for a long time afterward, in no wise interfered with the mill or dam of A; but in 1869, parties owning mining claims above both dams began to work their claims by a system entirely unknown at the time the dams in question were built, which system (booming) consisted in alternately checking the flow of water and then letting it out suddenly at a full head, whereby great quantities of tailings were carried down stream, which, settling between the two dams in question, caused an obstruction to the mill-wheel belonging to A, the plaintiff. *Held*, that B, the defendant, was not responsible; that it was a damage resulting only as a remote result of his building the lower dam, and that it was a clear instance of *damnum absque injuria*. *Proctor v. Jennings*, 265

8. *Action to abate nuisance—Damages—Proof necessary to warrant recovery.*—In an action to recover damages for the erection of a dam, and to abate the same as a nuisance, it appeared that the defendants had erected a dam across a cañon at a point below a mining claim worked by plaintiffs, which dam obstructed the flow of water and tailings so as to interfere with plaintiffs' workings. *Held*, that to enable plaintiffs to recover it should have appeared at the trial: 1st, That the plaintiffs owned the ground claimed by them. 2d, That the dam prevented their working to advantage. 3d, Alternatively, that the defendants had no title to the bed of the cañon, or if they had, that their right was acquired subsequent to that of the plaintiffs, or if prior, that the dam was not needed to enable the defendants to work to advantage. *Stone v. Bumpus*, 271

9. *Injunction—Dam to stop tailings.*—A court does not abuse its discretion by refusing an injunction to restrain parties from building a dam on their own mining ground, to prevent injury to it by the flow of tailings from other ground. *Nelson v. O'Neal*, 275

10. *Injuries from breaking dam.*—If a dam constructed in a good and workmanlike manner, and used with reasonable care, breaks at a

DAM. *Continued.*

high stage of water and injures mining claims below, the owners of the dam are not liable for the damages. *Everett v. Hydraulic Flume T. Co.*, 589

11. *Interruption of flow of water.*—The prior appropriator of water may recover damages for an irregular flow of water in his ditch caused by a dam erected on the creek above the head of his ditch if the injury sustained is not a mere temporary or trivial one. *Natoma Mining Co. v. McCoy*, 590

See DITCH.

DELIVERY.

1. *Oil burning during delivery—Loss on tender.*—Defendants purchased of the company, plaintiff, four barges of oil at a certain price per barrel. The barges were furnished by the defendant, and were partially filled when the oil caught fire and barges and oil were burned. *Held*, that the property did not pass as fast as the oil entered the barges; that the defendant could not have been compelled to accept partially filled barges; that the delivery was not complete, and defendant not therefore liable for the value of the oil. *Rochester & Oleopolis Oil Co. v. Hughey*, 282

2. *Idem—Control of barges during delivery.*—Evidence that by the custom of the trade at the place of delivery the barges to receive the oil were, during the delivery, in the custody and control of the purchaser, was properly rejected as not aiding the fact of delivery. *Id.*

3. *Incomplete sale of coal.*—G. & Co. agreed in writing that they would deliver to S. & W. at their landing in Pittsburgh two barges of coal, "price to be 4¼ cents per bushel, Cincinnati or Louisville gauge. Terms, cash when delivered in Pittsburgh free of all charges." S. & W. furnished the barges, and the coal was placed therein by G. & Co., but owing to the low water in the river they could not be taken to Pittsburgh. While thus lying at the works the coal was levied upon by creditors of G. & Co. S. & W. brought an action of replevin. *Held*, that as the delivery of the coal had not taken place and the terms of the contract of sale had not been performed, no title to the coal passed which could be enforced in replevin by the purchasers; and that the remedy for breach of contract of sale was in a different action. *Sneathen v. Grubbs*, 286

DEPOSITIONS.

1. *Depositions de bene esse.*—Though depositions taken *de bene esse* are irregular, yet at the hearing of the cause it is too late to make objection on that ground. *Dean and Chapter of Ely v. Warren*, 233

DESCRIPTION.

1. *Privilege extended by local evidence of description.*—Articles of agreement were made for erecting iron works. Such articles called for a conveyance of a half interest in five acres, part of a certain 100 acres called the Cat-tail Meadow. Such 100 acres were parcel of one 640-acre tract at that time. The articles further provided "that Snodgrass shall have free privilege of timber necessary for coal and building that may be

DESCRIPTION. *Continued.*

requisite for said works." *Held*, that evidence of the local situation of the entire tract was admissible, and that the privilege would extend to the entire tract. *Snodgrass v. Ward*, 306

2. *Vague entry, insufficient—Notice.*—An entry so vague that it affords no notice to a second enterer, who both surveys and pays before the first entry is made sufficiently specific, is void as to such subsequent entry. *Johnston v. Shelton*, 308

3. *Insufficient description.*—An entry of "640 acres beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's Bear-pen on the Hogback mountain and running various courses, for complement," is in itself too vague and indefinite; it would amount to a floating right. *Id.*

4. *An entry must amount to notice.*—An enterer has no equity or collateral claim independent of the entry; the entry should be definite in itself, or be made so by a survey, otherwise it gives no notice to affect the conscience of others. *Id.*

5. *Location—Mistake in course of vein.*—A misdescription in the notice of a claimant of a quartz lode, posted up near the premises, in compliance with the mining laws of the district in which the lode was situate, calling for the vein in a southwesterly direction, when, in fact, the vein, as afterward ascertained, ran nearly due south, the lode being under ground and undeveloped, will not vitiate the claim. The thing intended to be taken up was the vein, and its exact direction could not, of course, be ascertained or accurately described until the vein was followed up or explored. *Johnson v. Parks*, 316

6. *Latent ambiguity solved by jury.*—Where the lease described what was let by the lessors as their "coal-bank and the appurtenances thereunto belonging," and did not otherwise describe the premises leased, nor the boundaries, in an action for the rent reserved, in which eviction is set up as a defense, it is for the jury and not for the court to say what was the extent of the demise, it being rather a latent ambiguity to be solved, than an instrument of writing to be construed. *Tiley v. Moyers*, 320

7. *False description rejected as surplusage.*—When a deed conveys a right of way by two independent descriptions and one of them is false in fact, such false description must be rejected as surplusage. *Reed v. Spicer*, 330

8. *Sufficient description for assessment purposes.*—Where the assessment called for "one mine of four thousand and four hundred feet on Last Chance Hill," it is a sufficient description of the possessory right for the purposes of taxation, when coupled with knowledge that it is almost a universal custom in Nevada to take up mining claims, describing them as so many feet of a lode, but giving no lateral boundary to the claim; and such description will not include the fee simple title. *Nevada v. Real del Monte Co.*, 334

9. *Variance—Consolidated claims one mine.*—Where the complaint filed to enforce such assessment enlarged the description so that it read, "those certain mining claims situate on Last Chance Hill in said county

DESCRIPTION. *Continued.*

known as the Real del Monte, Aurora, Last Chance, * * containing in all 4,400 feet, more or less, and being the same property described in the assessment," there is no variance between the two descriptions. Where many claims are consolidated in the hands of one company there is no impropriety in calling it one mining claim. *Id.* 335

10. *The words "Pocotillo Mine," in a mortgage, construed.*—Where a dispute arose between Brandow and the Pocotillo Silver Mining Company, as to the ownership of eight hundred feet of mining ground, and, on an amicable settlement, a contract was entered into between them in which, after reciting the controversy as to such mining ground "known as the Pocotillo Mine," Brandow agreed to convey to said company all his right, title and interest in "said claim or mine," and the company agreed among other things, to pay Brandow \$15,000, and that the contract should "operate as a lien by way of mortgage upon said mine" to secure the same. *Held*, that the mortgage was restricted to the mining ground in controversy, and could not include the Pocotillo Mine in fact, which embraces much more ground. *Brandow v. Pocotillo Silver M. Co.*, 337

11. *Description limited to the mine so known at time of contract.*—The words "Pocotillo Mine" being used in the contract to designate certain mining property therein specifically described, could not be construed to intend any additional part of the larger tract afterward known as the Pocotillo Mine. *Id.*

See LEASE, 7.

DILIGENCE.

1. *Sickness and want of means no excuse for delay.*—In considering the question of reasonable diligence upon enterprises requiring much labor and capital, the illness of the principal operator, or his want of pecuniary means, and such other accidents causing delay as are incident to the person and not to the enterprise, can not be taken as an excuse to prolong the time which should be allowed. *Ophir Mining Co. v. Carpenter*, 640

2. *Due diligence defined.*—To constitute diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises who desire a speedy accomplishment of their designs; such assiduity as shows a *bona fide* intention to complete it within a reasonable time. *Id.*

See APPROPRIATION, 10, 11; LEASE, 1; LOCATION, 15; MEASURE OF DAMAGES, 4.

DIP.

1. *Following lode beyond side lines.*—One who seeks to establish a right to pursue his lode beyond its side lines must be able to show that the lode is continuous and in place throughout its whole course from its origin in his own ground, to the place beyond in which he claims it. *Leadville Mining Co. v. Fitzgerald*, 380

2. *Departure from the perpendicular.*—A vein dipping at any angle between a vertical and a horizontal position has a departure from the perpendicular within the meaning of § 2322 R. S. U. S. *Id.*

DIP. *Continued.*

3. *Ancillary or side veins.*—Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downward, to which no right had attached in favor of other parties at the time the location became valid although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical sides lines. *Jupiter Mining Co. v. Bodie Co.*, 412

DISCOVERY.

1. *Veins can only be discovered on public lands.*—If two locations of mining claims are made by the same party which interfere with each other, the second location includes only so much ground as is exclusive of the first, and if the discovery of the second is within the boundaries of the first location, then such second location is invalid, for it is a condition precedent to the location of a mining claim, that a discovery of a vein, bearing valuable minerals, shall first be made within the limits of such location, independent of any other subsisting and valid location. It is upon the public mining lands that the vein must first be discovered. *Golden Terra M. Co. v. Mahler*, 390

2. *Discovery after location made.*—But if such party afterward discovers a vein upon that portion of the second location which is exclusive of the first, the staking, recording and improving will inure to his benefit, and the validity of the location will date from the time of such discovery. The order of the acts to be performed is non-essential, provided no intervening rights of others have accrued. *Id.*

3. *Pay ore not essential to discovery.*—A vein is discovered when there is disclosed a well-defined body of rock in place carrying gold, which body afterward proves to be continuous, and it is not essential that it should carry pay ore. *Id.*

4. *Discovery of mineral, though made after location will avail against strangers.*—Though the locators of a mining claim may not, at the time of the location and survey of the claim, have sunk their shaft to the discovery of mineral in place, yet, if they shall thereafter so sink the shaft and find the lode, they will hold as against all who had not theretofore acquired an interest in the lode, the discovery relating back to the location. *Zollars v. Evans*, 407

5. *Discovery of a vein.*—No rights can be acquired, under the statute, by location, before the discovery of a vein or lode within the limits of the claim located. *Jupiter M. Co. v. Bodie Co.*, 411

6. *Discovery of vein after location.*—A location is made valid by the discovery of a vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same claim by other persons. *Id.* 412

7. *Locator need not be discoverer.*—It is not necessary that the locator should be the first discoverer of the vein, but it must be known and claimed by him in order to give validity to his location. *Id.*

8. *Discovery notice holds the claim pending location—Constructive*
46

DISCOVERY. *Continued.*

possession.—The statute of Colorado, which gives sixty days after the discovery of a mining claim in which to sink a discovery shaft and make a location, does not require the discoverer to remain during that interval, in actual personal possession by being present upon the ground. The erection of the discovery stake, with the required notice thereon, is notice to all others of the claim of the discoverer, and amounts to constructive possession, which is sufficient during the period provided by the statute. *Erhardt v. Boaro*, 432

9. *Notice—How made.*—A notice posted at the point of discovery, specifying the nature and extent of his claim, will protect the locator's right for the time allowed by law in which to complete the location, although he may be absent from the claim during part of such time. *Erhardt v. Boaro*, 434

10. *Same—Must specify extent of claim.*—But if he fails to specify in his notice of discovery and claim to the ground the extent of his claim, as that it extends a certain distance from the point of discovery in a direction named, it will relate only to the place where it stands. As against others afterward locating in the vicinity, it will cover only ground necessary for sinking a shaft. *Id.*

11. *Prerequisites to location—Discovery outside of discovery shaft.*—Under the statutes, Federal and State, no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim; and a discovery shaft must be sunk thereon to the depth of at least ten feet. The mineral or ore so discovered must be in position—in the form of a lode—and not in a broken and fragmentary condition, intermingled with slide and debris on the surface. Discovery of ore after location, in a different part of the claim, will not avail. *Van Zandt v. Argentine Co.*, 441

12. *The burden* is on the plaintiff to establish the fact that ore was so found in his discovery shaft, and that the same lode is continuous to the ground in controversy. *Id.*

See POSSESSION, 1.

DISTRICT RULES.

1. *Miners' rules must be in force.*—To be of any validity, a rule or custom of miners must not only be established or enacted, but must be *in force* at the time and place of the location. It ceases to be operative whenever it falls into disuse, or is generally disregarded. *Jupiter M. Co. v. Bodie Co.*, 411

2. *Must not conflict.*—The rules and customs of miners must not conflict with the laws of the United States, or the laws of the State in which the claims are located. *Id.*

3. *District rule may exist in parol.*—Section 748 of the Code of Civil Procedure of California is still in force, except so far as it is limited by act of Congress; and no distinction is made by this provision of the State statute between a custom or usage proved by parol evidence and a rule adopted by a miners' meeting and recorded in writing. *Id.*

4. *Existence of rule is a question of fact.*—Whether or not a mining

DISTRICT RULES. *Continued.*

law or custom is in force at any given time is a question of fact; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved. *Id.*

5. *Mining regulations as evidence—Affecting vested rights.*—In a suit for the possession of mining claims, the defendant was allowed to read in evidence the mining rules of the district, though adopted after the plaintiffs' rights had attached. *Held*, that as defendants claimed under the rules, they were competent for the purpose of determining the nature and extent of their claim, and their effect upon pre-existing rights was sufficiently guarded by the instructions. *Roach v. Gray*, 450

6. *Appropriation limited.*—The mining rules of a district may limit the quantity of ground which a party can acquire by location or prior appropriation. *Prosser v. Parks*, 452

7. *Right to purchase unlimited.*—Such rules can not limit the quantity of ground he may acquire by purchase. *Id.*

8. *Usage and custom confined to the district.*—Questions affecting a mining right should be solved according to the customs and usages of the bar or diggings embracing the claim, *whether written or unwritten.* *Morton v. Solambo Co.*, 463

9. *Mining customs—Conditions, precedent and subsequent—Forfeiture.*—The mining customs of any particular mining district are the common law of mining. Compliance with the customs which point out the manner of locating mining ground, is a condition precedent, and the regulations which require that so much work must be performed upon each claim are conditions subsequent which must be complied with, or the claim be forfeited to the United States. It is not necessary that the law should provide in terms for such forfeiture. *King v. Edwards*, 480

10. *Customs, a question for a jury—Law of other districts.*—The issue as to what customs are in force in a district is properly left to the jury, and the customs of an outside district can not be introduced to vary them. *Id.*

11. *Written law presumed in force—Contrary custom may be shown.*—When the written laws of a district provide for work in the district to represent mining ground therein, these laws are presumptively in force, and parties who claim to represent their ground by work outside of the district, must show a positive custom sanctioning such representation. *Id.*

12. *Change of boundaries.*—The boundaries of a mining district may be changed, but such change can not interfere with rights vested under district rules existing before the change. *Id.*

13. *Customs must be reasonable—Representation by work on flume in another district.*—All mining customs must be reasonable, and where it appears that mining ground could not be profitably worked without going outside the district to run a bed-rock flume to it, a custom which would require work to be done in the district to represent it, might be considered unreasonable. *Id.*

14. *Labor on claim or location.*—The local laws of White Pine district which require two days' work for every location do not mean two days' work for each two hundred feet, but for the entire mining claim, irrespect-

DISTRICT RULES. *Continued.*

ive of the number of locators or feet. *Leet v. John Dare Mining Co.*, 487

15. *No distinction between written and unwritten customs.*—No distinction is made by the statute in California between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law. *Harvey v. Ryan*, 490

16. *District rules become void by non-user.*—Such laws, whether written or not, acquire validity from the customary obedience of the miners, and are void whenever they fall into disuse; hence, an unwritten regulation, reasonable and in general use, may prevail against a written custom which has fallen into disuse. *Id.*

17. *Proof of location notice required by unwritten rule.*—It is error to reject proof of a parol custom requiring a location notice, although such notice was not required by the written rules. *Id.*

18. *A district rule must not only be established, but must remain in force,* and whether it be in force or has fallen into disuse is a question of fact for the jury. *Id.*

19. *Evidence—The district books—Montana practice.*—The book containing the mining laws of a district is competent evidence under § 504 of the Montana Practice Act, viz.: "In actions respecting mining claims, proof shall be admitted of the customs, usages and regulations * * * and such customs, usages and regulations, when not in conflict with the laws of this Territory, shall govern the decision of the action." And, under § 207 of the same act, the book was rightfully taken by the jury to the jury room. *Orr v. Haskell*, 493

20. *District records as evidence of title.*—A book for the record and transfer of mining claims, shown to be authorized by the rules of the district, was offered in evidence and admitted without objection, and showed several transfers by which a title to the premises in controversy was vested in plaintiffs. *Held*, that the book was at least secondary evidence, which, being admitted without objection, made out the plaintiffs' case and put the defendants to the proof of a forfeiture or abandonment by plaintiffs. *St. John v. Kidd*, 455

21. *Proof of mining rules by copy—Affidavit.*—In order to introduce evidence of the local mining laws of a district, it is necessary that it should be made to appear *aliunde* that the copy offered comes from the proper custodian, and that such person was empowered to give certified copies thereof, so as to become evidence, and that such was a copy of the laws in force in such district. Such copy can not be proved by affidavit. *Roberts v. Wilson*, 498

22. *Mining rules, their history and character.*—The history and nature of miners' laws and customs stated and explained. *Jennison v. Kirk*, 504

23. *Statutory law controls local customs.*—The act of Congress approved July 26, 1866, provides "that whenever, by priority of possession, rights to the use of water for mining, etc., purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such

DISTRICT RULES. *Continued.*

vested rights shall be maintained and protected in the same." In construing this section it was *held* that the law with respect to the use of water may be shown by evidence of the local customs, or by the legislation of the State, or the decisions of the courts; and that the union of the three conditions is not essential to the perfection of the right by priority, but in case of conflict between a local custom and a statutory regulation, the latter must control. *Barnes v. Sabron*, 673

DITCH.

1. *A ditch includes its dams.*—A ditch carrying water for mining operations includes any dam which is essential to maintain the flow of water in the ditch; and to cut down any such dam is to cut the ditch, within the statute making it penal to cut a ditch. *Castleberry v. State of Georgia*, 224

2. *Right of way in ditch the same as the ditch itself.*—A deed which conveys all the right of way in, to and for a mining ditch called the "M. B. W. Co." is a conveyance of the ditch; for there can be no distinction between the right of way in the ditch and the ditch itself. *Reed v. Spicer*, 330

3. *Act of Congress of July 26, 1866, construed—Local customs applied to water rights and rights of way.*—The ninth section of the act of Congress of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes" enacted, "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid, is hereby acknowledged and confirmed. *Provided, however*, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." *Held*, that both the right to the use of water and the right of way mentioned in said section are subject in their enjoyment to the local customs, laws and decisions; the object of the section being to give the sanction of the United States to rights which had previously existed under such local laws. The proviso conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain, whose possessions might be injured by such construction. *Jennison v. Kirk*, 504

4. *Water rights a corporeal privilege.*—The right to water is treated in California as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and as such has none of the characteristics of mere personalty. *Hill v. Newman*, 513

5. *Relations to the fee.*—The right to water may exist without ownership of the soil over which it flows. *Id.*

DITCH. *Continued.*

6. *Ditch across ranch claim.*—A miner has no right to work within the inclosure surrounding a dwelling house, corral and other improvements of another. *Burdge v. Underwood*, 518

7. *Ravine used as ditch bed.*—A ditch owner may use a ravine as a connecting link between different portions of his ditch, and the fact that the water, which at times flowed naturally into the ravine, had been previously appropriated by others, would not deprive him of this right; the appropriation of the water does not carry with it the exclusive use of the bed of the stream. *Hoffman v. Stone*, 520

8. *Enlargement of ditch.*—The plaintiffs sought to recover on the ground that defendants had enlarged their ditch since the commencement of plaintiffs' ditch. *Held*, that defendants were not limited to the quantity of water they had turned into their ditch in the first instance, unless by the general plan, size and grade of the ditch, it was not capable of carrying more water than was then diverted. *White v. Todd's Valley Water Co.*, 536

9. *If by reason of obstructions or irregularity in grade*, it was not capable of conveying as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove the obstructions, and then might fill the ditch to its capacity. But a failure for an unreasonable length of time to remove the obstructions or adjust the grade and to divert more water through their ditch, would limit them to the amount first diverted. *Id.*

10. *Diversion of water from choked ditch.*—In such an action, where both parties claimed water from the same stream: *held*, that defendant was not liable for deficiency of water in plaintiff's ditch, unless defendant was diverting more water than he was entitled to, at the precise time that such deficiency existed. *Held, further*, that plaintiff could not recover for alleged diversion of water from one of his ditches, if the jury believed that, at the time of the alleged diversion such ditch was so filled up with tailings that it was incapable of carrying off the water itself. *Brown v. Smith*, 539

11. *Ditch, not a building or superstructure.*—A ditch is not a building, and in no sense can be denominated a superstructure under the Mechanic's Lien Law. *Ellison v. Jackson Water Co.*, 559

12. *Injury to ditch occasioned by hydraulic process of mining.*—A person who constructs a water ditch across a mining claim previously located and worked by the hydraulic process, holds subject to the prior rights of the owner of the mining claim and can not recover damages for the washing away of a portion of his ditch so that the waters escape, if such washing away is done in the usual and reasonable method of working the mining claim. *Jennison v. Kirk*, 504

13. *Injuries from overflow.*—The owner of a ditch is bound to keep it in repair so that it will not overflow or break through its banks to the injury of lands of other parties; and if, through his fault in failing to keep it in repair, it washes away the soil, or deposits sand on the land along which it passes, he is responsible therefor. *Richardson v. Kier*, 612

14. *Natural channel—Ravine.*—Where a natural ravine is adopted as

DITCH. *Continued.*

part of the course of a ditch, the ditch owner is not responsible for an overflow of the water naturally running in such ravine. He adopts such natural water course only to the extent of the flow of his ditch, and is only responsible for the overflow of the water resulting from his use of the ravine for the purposes of a ditch. *Id.*

15. *Evidence of value of ditch—Measure of damages.*—In a suit by the owners of a water ditch to enjoin the defendants from further working their mining claims beneath the surface of the earth over which plaintiffs' ditch extended, for the reason that the ditch would be irreparably injured by the settling of the earth caused by such mining, the plaintiffs offered testimony as to the profits realized by them from certain mining claims which they owned and worked with water from their ditch at a point below defendants' claim. *Held*, that the testimony could only be relevant as to the value of the ditch, and would not tend to establish such value unless accompanied with further evidence showing that the claim could not be worked without the aid of the ditch. In the absence of such proof, the value of the ditch should have been proved in the ordinary way, by showing its capacity, the value of water for mining purposes in the vicinity, and the probable duration of the demand. *Clark v. Willett*, 628

16. *Rights of ditch on public lands.*—The Mining Act of Congress of July 26, 1866, operated as a grant of the right of way and of the ditch, where a right to the use of water such as was "recognized and acknowledged by the local customs, laws and decisions of courts," had been acquired at the date of its passage; and the subsequent grantees of the United States take subject to the easement. *Broder v. Natoma Mining Co.*, 670

17. *State statute construed.*—The Nevada act of March 5, 1869, applies only to cases where persons desire to construct ditches through the lands of others, and find it necessary to condemn the land because the consent of the owner can not be obtained. *Barnes v. Sabron*, 673

18. *Reasonable use—Ditch not used to its full capacity.*—What amounts to a reasonable use depends upon the circumstances of each case, but a party who constructs ditches carrying a greater quantity should not be confined to the amount of water used by him the first and second years after his appropriation, nor his rights regulated by the number of acres he then cultivated; the object in view at the time of his diversion of the water is to be considered in connection with the actual extent of his appropriation by such ditches. *Id.*

19. *Findings as to capacity of ditch.*—Where a finding as to the capacity of a ditch is based upon its being of a certain size and grade, and though its size is proved there is no sufficient proof of its grade. *Held*, that the finding should be set aside and a new trial granted. *Ophir Mining Co. v. Carpenter*, 653

20. *Idem—New issues in Supreme Court.*—In a controversy as to the amount of water appropriated, both parties conceded that it should be measured by the capacity of a certain flume at a certain point. *Held*, that the investigation in the Supreme Court should be confined to the same section of the flume in reviewing the finding as to its capacity. *Id.*

DITCH. *Continued.*

See, APPROPRIATION; EVIDENCE, 7; EXPERTS; FLUME; MEASURE OF DAMAGES. 2, 6; NUISANCE; TENANTS IN COMMON; WEIGHTS AND MEASURES.

DRAINAGE.

1. *Servitude of lower mine.*—The owner of a mine at the higher level has a right to work his whole mine, in the manner usual and proper for getting out the minerals, and is not liable for any water which flows by gravitation into the adjoining mine from works so conducted. But he has no right, by pumping or otherwise, to be an active agent in sending water from his mine into the adjoining mine. *Baird v. Williamson*, 368

See EASEMENT; VERDICT, 5.

EASEMENT.

1. *Tenant at will has no easement to take soil.*—An occupant who is only a tenant at will can never have a right to take away the soil of the lord. *Dean and Chapter of Ely v. Warren*, 233

2. *Res gestæ; visible servitudes.*—To give effect to all parts of the instrument, the surrounding circumstances, within the knowledge of the parties, must be considered; the references to the mill show an intent to allow its use to continue, and a purchaser must take with reference to all servitudes visibly attached at the time of sale. *Oregon Iron Co. v. Trullinger*, 247

See DRAINAGE.

EJECTMENT.

1. *What necessary to maintain for mining claims—Burden of proof.*—To maintain an action of ejectment for a mining claim, the plaintiff must establish not only that he is in possession, but that a lode had been discovered on the claim prior to the commencement of action and that such lode so discovered extends from the discovery shaft to the ground for which he sues. These are facts to be determined by the jury, from a preponderance of the evidence. As to them, the burden is on the plaintiff. *Zollars v. Evans*, 407

2. *Outstanding title no defense to action for possession.*—The rule that plaintiff must recover upon the strength of his own title does not apply to actions for the recovery of the possession of a mining claim, and proof of outstanding title is no defense to such action, unless the defendant connects himself with it. *Bradley v. Lee*, 471

See EVIDENCE, 6; CONVEYANCE, 5; LEASE, 6.

EMBEZZLEMENT.—See INDICTMENT, 4.

EQUITY.

1. *Damages allowed in equity, only as an incident.*—Where proper ground for equitable relief is laid and sustained, and jurisdiction has thus attached, courts of equity will proceed to award compensation or damages when they are incidental to such relief, but not otherwise. *Koch's and Balliet's Appeal*, 151

See LIEN; WATER, 20.

ESTOPPEL.

1. *Estoppel against stockholders by acquiescence.*—To work an equitable estoppel upon the stockholders, it was not necessary that they should expressly assent to the issuance of the preferred stock; it was sufficient that they neglected actively to condemn the unauthorized act and to seek judicial relief until third parties would be injured by the granting of it. *Kent v. Quicksilver Co.*, 47

2. *There is no estoppel between a corporation and the subscribers* to its stock; and its action to recover subscriptions may be defeated upon inquiry into the conditions upon which the subscriptions were made. *Coyote Mining Co. v. Ruble*, 88

3. *No estoppel by silence, to affect title.*—An instruction, that if defendants owned the ground in dispute, but stood by and permitted plaintiffs to expend money and labor in developing it and by their silence induced plaintiffs to believe their title good, then such matters should be taken into consideration in determining the conflicting claims, is erroneous, for such matters could have no possible effect upon the question of title. *Stone v. Bumpus*, 271

4. *Abandonment.*—A applied to B to know if there was any mining ground in the vicinity which was vacant, and upon which he would be likely to find ore. B pointed out certain ground, stating that it was vacant and that A could locate and appropriate it to his own use. A thereupon located and worked the ground until it became valuable, when C, to whom B had afterward granted, claimed the premises under a location which B had previously made but concealed from A. *Held*, that every element essential to constitute an equitable estoppel sufficient to operate as a transfer of the title from C, if he possessed it, is here present; but that the case is more in the nature of an abandonment of the property by B. *Golden Terra M. Co. v. Mahler*, 390

5. *Water rights.*—If those who have the prior right to water stand by and allow others to expend money and labor in appropriating the waters of a stream under the mistaken idea that they have the better right to the water, the first appropriators will be estopped from setting up their prior right. *Parke v. Kilham*, 523

See JUDGMENT, 3.

EVIDENCE.

1. *Obligation accepted from corporation—Presumption.*—One accepting the obligation of a company as the engagement of a corporation clothed with statutory liability only, and treating with them as such, is presumed to have known the extent of that liability, and to have acted with reference thereto. *Humphreys v. Mooney*, 76

2. *Assertion of right no threat.*—The declaration of the owner of a cañon claim before building a dam, that he would put in a dam that would flood plaintiff's claim (a junior claim lying above), is entirely consistent with the necessity or utility of the structure in the working of the cañon. *Stone v. Bumpus*, 278

3. *Statements of one do not bind other co-tenants.*—The representation of one tenant in common as to the extent of the subject of the grant of himself and his co-tenants, can not amount to an estoppel against his co-

EVIDENCE. *Continued.*

tenants, nor against himself unless acted upon by the purchaser. *Dexter Lime Rock Co. v. Dexter*, 291

4. *Negative testimony*.—The rule in respect to the relative value of positive and negative testimony has no application to the case where one party to a verbal mining lease testifies that it did, and the other that it did not, include certain premises. *Sobey v. Thomas*, 359

5. *Presumption of ownership in locator*.—Every locator shall be regarded as the owner of all valuable deposits within his own lines until some one shall show by a fair preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere. *Leadville M. Co. v. Fitzgerald*, 380

6. *Attempt to prove two titles*.—Plaintiffs attempted to derive title through two different locations, and proved a clear title under the second, without objection by defendants. *Held*, that this was sufficient to sustain a verdict for plaintiffs, and that the admission of evidence relating to the first location, even if erroneous, became immaterial. *St. John v. Kidd*, 454

7. *Loss of customers*.—On the trial of an action for interference with the flow of water in a ditch for supplying mines, proof that in consequence of the irregularity of the flow of water, the owners of the ditch have lost their customers, is competent evidence "as showing that the damage to the plaintiff was not trivial or temporary, but of such a character as to cause actual and serious injury. *Natoma Mining Co. v. McCoy*, 590

8. *Cross-examination on the sources of appropriation*.—The defense to a suit for the diversion of water from Gold creek was that plaintiffs had only appropriated 100 inches of the water, and had always been allowed that much. *Held*, that defendants might show by cross-examination of plaintiffs' witness that the excess of water in plaintiffs' ditch over 100 inches came from another source than Gold creek. *Caruthers v. Pemberton*, 622

9. *Conflicting testimony—Duty of courts*.—The duty of determining the truth where testimony is conflicting, belongs almost exclusively to the *nisi prius* courts, but it is also the duty of all courts to ascertain whether, upon any given state of facts it can be harmonized, before rejecting any of it. *Barnes v. Sabron*, 674

See CONFUSION; DEPOSITIONS; DISCOVERY, 12; DISTRICT RULES, 19, 20, 21; EJECTMENT, 1, 2; EXPERT; LOCATION, 10; PLEADING AND PRACTICE, 13, 24, 28; POSSESSION, 2; WITNESS; WATER, 18.

EXPERTS.

1. *Opinion of experts—Cause of injury to water ditch*.—Witnesses called to prove the damages done to a ditch as the result of mining in proximity to it can not, on the direct examination, be questioned as to the effect of similar mining at points not in controversy, although the same kind of soil, etc., was alleged to exist at such point, so as to induce the idea of similar results, by comparison. The proper course in such cases is to take the opinion of witnesses who have examined the premises and are

EXPERTS. Continued.

otherwise qualified to judge intelligently of the cause producing the injury. *Clark v. Willett*, 628

EXTORTION—See **CRIMES**, 21.

FINDINGS.

1. *Evidence sufficient to justify findings relative to gold mining.*—A jury is justified in finding that the defendant is engaged in mining for gold when both plaintiff's and defendant's witnesses speak of his "claim," and of his labor as "mining," and also of his "sluice-boxes," "wing dam," and of his mode of "working claim" and "depositing tailings," when there is no counter testimony. *Hill v. Smith*, 597

2. *Presumption as to findings.*—In such a suit, the trial being by the court without a jury and judgment rendered for defendant, if no findings of fact are made, the presumption is that all issues were found against the plaintiffs. *Clark v. Willett*, 628

See **PLEADING AND PRACTICE**, 35.

FLUME.

1. *Flumes are parcel of the ditch.*—Flumes constructed at different points on the line of a ditch are mere connecting links over ravines and gulches, and do not change the general character of the work as an excavation; the whole must be regarded as a ditch. *Ellison v. Jackson Water Co.*, 559

FORFEITURE.

1. *Forfeiture distinguished from abandonment.*—The term forfeiture means the loss of a right to mine a particular piece of ground previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situate. As a defense, it is entirely distinct from that of abandonment. It involves no question of intent, which is the principal question in the defense of abandonment, but involves only the question—has the party observed the mining rules and regulations? *St. John v. K dd*, 455

2. *Forfeiture considered as aiding development.*—The condition of development should be attached to every mining claim. The policy of the government is to encourage the extraction of the precious metals, and courts should maintain that construction of mining customs which will accomplish this end. This policy considered with relation to enforcing forfeitures. *King v. Edwards*, 480

See **RECORD**, 2.

GOLD DUST—See **CRIMES**, 19.

INDICTMENT.

1. *Amending caption for indictment.*—Where the style of the court is misdescribed in the caption of an indictment, it may be amended on motion of the district attorney. *Farnum v. United States*, 192

2. *Description of letters in indictment for secreting same.*—In an in-

INDICTMENT. *Continued.*

dictment against a mail carrier for secreting or embezzling letters, it is not necessary to state to whom the letters were sent nor by whom they were written. *Id.*

3. *Indictment for larceny of ore—Severance from realty.*—It was objected to an indictment for the larceny of "610 pounds of silver-bearing ore," that the property alleged to have been stolen savored of the realty, and the indictment did not show it to be personal property. *Held*, that the words "silver-bearing ore" refer to a portion of vein matter which has been extracted from a lode and assorted, separated from the mass of waste rock and earth and thrown aside for milling or smelting purposes, or taken away from the ledge; and that they necessarily imply a severance from the freehold. *State v. Berryman*, 199

4. *Embezzlement—Larceny by bailee.*—The first count of the indictment charged the defendants with embezzlement as "trustees and agents;" the third, with embezzlement as "bailees;" the fourth, with embezzlement as "trustees, agents and bailees," and the fifth with larceny as "bailees and agents." *Held*, that the first and fourth should have been quashed, because they blended two or more offenses in one count, and the third because there is no such offense at common law nor under the code as "embezzlement as bailee." *Held*, also, that the fifth count was good; that there being no such offense as "larceny as agents," the word "agents" did not introduce another offense into the count, but should be rejected as surplusage. *Hutchison v. Commonwealth*, 209

See CRIMES.

INJUNCTION.

1. *Agent enjoined.*—When a corporation holds possession of its property by an agent, and such agent is discharged, and the possession of such property is taken by another agent duly authorized. *Held*, that if the possession of the latter is threatened by the former, the discharged agent will be enjoined by the corporation from any interference with the possession. *Flagstaff M. Co. v. Patrick*, 19

2. *Injunction to prevent interference with possession.*—Where there is a well grounded fear that a discharged agent of a corporation will use force to repossess the property in charge of its duly appointed agent, a court of equity will protect such possession by injunction. *Id.*

3. *Injunction to stay waste.*—This remedy suggested, but not acted upon, by the chancellor. *Dean and Chapter of Ely v. Warren*, 233

4. *Injury already complete.*—Where a mining claim had been worked before suit in such a way by washing the earth from under the plaintiff's ditch, that according to the testimony it must result in the ruin of the ditch from the work already done. *Held*, that further work on a valuable claim ought not to be enjoined, the result necessarily being injury to the defendants without benefit to the plaintiffs. *Clark v. Willett*, 629

5. *Practice—Injunction after verdict upon legal issues.*—In a suit in which equitable relief is sought by injunction, but which is entirely dependent upon the legal issues, the parties have a right to claim a jury to

INJUNCTION. *Continued.*

determine all the legal issues, and an injunction can only be granted when the verdict of the jury is in his favor who claims such equitable relief.

Ophir Mining Co. v. Carpenter, 641

6. *Possessor of water right may have injunction.*—A party in possession of a ditch and the water incident to the ditch, has such an equitable interest therein, that he can maintain an action for injunction against a party who attempts to appropriate the same. *Barkley v. Tieleke,* 666

See DAM, 1, 2, 9.

INSTRUCTIONS—See PLEADING AND PRACTICE.

IRRIGATION.

1. *Prior appropriation of water for irrigation.*—The right to mine under land occupied for agricultural purposes does not give the right to take the water already appropriated by the surface occupant by his irrigating ditch. *Rupley v. Welch,* 245

2. *Irrigator not allowed to waste water.*—The first appropriator is entitled to only so much water as is necessary to irrigate his land, and is bound to make a reasonable use of it. *Barnes v. Sabron,* 674

JUDGMENT.

1. *Remedy for sale under judgment afterward reversed.*—If a sale be made under an erroneous judgment which is afterward reversed, and the plaintiff in the judgment be himself the purchaser, the doctrine now is that the former owner, after reversal, may, at his election, either have the sale set aside and be restored to the possession, or have his action for damages. *Reynolds v. Hosmer,* 658

2. *Assignee of erroneous judgment liable for sale made under it.*—An action for damages for a sale under an erroneous judgment afterward reversed, is properly brought against the assignee of the judgment, who had control of the execution and purchased at the sale, and the original judgment creditor is not a necessary party. *Id.*

3. *Estoppel.*—The fact that such former owner has moved in the lower court to have the sale set aside, and his motion has been denied, will not estop him from afterward affirming the sale and maintaining his action for damages. *Id.*

See PLEADING AND PRACTICE.

JURISDICTION.

1. *Jurisdiction of justice of peace.*—Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted. *Hill v. Newman,* 513

JUSTICE OF THE PEACE—See JURISDICTION.

LARCENY—See CRIMES, 5, 11, 16, 18, 20, 22; INDICTMENT, 3.

LEASE.

1. *Lease of mine implies covenant to work with reasonable diligence.*

LEASE. *Continued.*

—Where a right to mine iron ore or other minerals is granted, in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into. *Koch's and Balliet's Appeal*, 151

2. *Remedy at law for failure to work mines.*—Where lessees, or parties holding mines under implied covenant to work, have neglected and refused to work the mines with reasonable diligence, it is very clear that the owners have a complete and adequate remedy at law for the recovery of such damages as they may have sustained. *Id.*

3. *Eviction of lessee—Rent—Recoupment.*—An eviction such as will suspend rent is an actual expulsion of the lessee out of all or some part of the demised premises; the rent already accrued and overdue is not forfeited by the eviction, but in an action for such rent, the tenant may default the damages caused by it. *Tiley v. Moyers*, 320

4. *Lease of coal bank equivalent to sale of coal.*—A demise of a coal bank for a term of years, in which the rent reserved is a fixed price per bushel for the coal to be taken from the bank, amounts to a sale of so many bushels as the tenant shall take during the term, for the price fixed in the lease. *Id.*

5. *Implied covenant for quiet possession—Rent not suspended by eviction.*—Where it was a disputed point as to how much was leased, the demise being of a "coal bank and the appurtenances thereunto belonging," and the lessor had had undisputed possession of one coal opening, if one only had been leased, the entry of the lessors, or others under them, upon other parts of the tract, would not be an eviction, and the lessee would be bound to pay for the coal taken by him from that opening. But if the grant was co-extensive with the coal veins of the whole tract, and the lessors, without interrupting the lessee's actual mining operations, entered and took coal from the tract demised, they were guilty of a breach of the implied covenant for quiet possession, and the lessee could set off the damages resulting therefrom against the claim for rent accrued under the lease. Such an eviction, however, would not suspend the rent, where it has not been reserved as an equivalent for the possession of the tract, but for the coal actually taken therefrom. *Id.*

6. *Recoupment by lessees for ejectment and estrepement.*—Where ejectment had been brought by the lessors to try the question of forfeiture, under a provision of the lease which forbade the tenant to let the mine stand idle for a year, in which they failed, damages therefor could not be allowed by the jury in action for the rent, but for the estrepement brought by them, which interrupted mining operations, damages were properly allowed and assessed by the jury under the charge of the court. *Id.*

7. *Lease of tortuous vein.*—When lessor demised the "Watkins Range or Works," being a vein or deposit of lead and zinc ore supposed to bear a certain general course, but which was afterward traced to the east line

LEASE. *Continued.*

of the quarter section, on which the discovery was situate, and thence through the lands of other parties by a circuitous course back into another part of the said quarter section, but there was no connection directly through the lessor's land or the said quarter section to the point where the deposit was traced back into such quarter section, at which point it had (after the lease granted, but before the connection proved) been discovered and worked by other parties. *Held*, that the lessee's right terminated when he reached the east end of his lessor's ground, being the east line of the quarter section, and did not extend to that part of the deposit within the lessor's tract as traced back, because not proved to connect on the same tract; and that the fact that the deposit was a horizontal seam did not affect the case, since lessee's right terminated when they reached the exterior line of the lessor's ground. *Sobey v. Thomas*, 859

LEDGE.

1. *Meaning of "ledge" as used in charter, construed with context deeds and collateral evidence.*—Certain proprietors, unable to work their lime rock as tenants in common to their satisfaction, became incorporate by special legislative charter, which divided their interests into 352 shares in the nature of stock. The contention arose as to the limits of, or what was included in the term "Dexter Ledge of Lime Rock" used in the said charter. The company contended that it included all the lime rock on the farms of the incorporators; defendants insisted that it was confined to the great ledge or hill. *Held*,

1.—That if the term "Dexter Ledge of Lime Rock" had acquired a settled meaning as including certain rock of definite extent, such lime rock only was intended, parol evidence being allowed to show such meaning.

2.—That construed with relation to the testimony and the context, it included not only the great ledge or hill, but what went sometimes by the name of the Hacklestone Ledge—but that it did *not* include the whole limestone formation on the lands referred to.

3.—The meaning is to be got from the circumstances attending the transaction and the intent of the parties, rather than from a strict geological interpretation of the words used; the intent to cover the whole stratum is negated by the use of specific terms of boundary. *Dexter Lime Rock Co. v. Dexter*, 291

2. *Signification of "ledge."*—The term "ledge" discussed with reference to "hill or elevation," "layer or stratum" and "rock in place." *Id.*

LICENSE.

1. *License to mine, exclusive.*—An oral contract allowing a party "to mine and dig for lead and zinc ore according to mining usage," *held*, to amount to an exclusive lease. *Sobey v. Thomas*, 360

LIEN.

1. *Equity liens limited to vendor's liens.*—Equity raises no lien with respect to real estate or work upon real estate, except the lien of vendor for purchase money. *Ellison v. Jackson Water Co.*, 559

LOCATION.

1. *Location notice, where placed.*—In order to hold a ledge, it is not necessary that the notice should be placed on the ore or any part of the vein or lode. It is sufficient if the notice is placed in such reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended. *Phillpotts v. Blasdel*, 342

2. *Requisites to give title to mining claim.*—On the public domain, a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of 1,500 feet in length, and 300 feet in width, he must prove a lode extending throughout the claim. *Zollars v. Evans*, 407

3. *How location to be marked.*—A location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced; but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds and written notices, whereby the boundaries can be readily traced, is sufficient. *Jupiter Mining Co. v. Bodie Co.*, 412

4. *Right of subsequent locator to object.*—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim. *Id.*

5. *Obliteration of monuments.*—After a location has been lawfully made, the right of the locator can not be divested by the mere obliteration of the marks or removal of the stakes without his fault, he having performed the other acts required by the statute. *Id.*

6. *Record—Stake may be permanent monument.*—The law of Congress requires no record of a mining claim except in obedience to valid local rules or customs of miners; but when such local rules or customs require a record it must contain the names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument, as will identify the claim. But such natural objects or permanent monuments are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground or of a shaft sunk in the ground. If by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular, otherwise not. *Id.*

7. *Location prevented by intimidation.*—That the discoverer is prevented from completing location within the prescribed time by intimidation on the part of an adverse claimant, is sufficient excuse, and will not deprive him of his right to locate the claim. *Erhardt v. Boaro*, 432

8. *Time allowed.*—Upon the discovery of a lode bearing silver in the public lands, a citizen is entitled to locate a full claim, and he has the time allowed by law to complete the location. *Id.* 434

9. *Estoppel—Trespasser.*—One who goes on ground taken up by

LOCATION. *Continued.*

another for mining purposes during the temporary absence of the first locator, and excludes him therefrom, and thereby prevents the first locator from completing his title, shall not be permitted to allege any defect in that title. *Id.*

10. *Evidence, what shall be of prior location.*—Proof of the date of plaintiff's location, the others not being shown, and the fact that plaintiff's location is excepted from defendant's patents, will raise a presumption that plaintiff's location was first made. *Van Zandt v. Argentine Co.*, 441

11. *The top or apex, on a junior discovery—Senior location on the "dip" will hold.*—Ordinarily the owner of a mining claim in which is found the top or apex of a lode, may follow the vein within or without his side lines on its "dip" to any depth; yet if the same vein has been previously discovered and located on the "dip," such discovery will prevail against a junior discovery, though located on the apex of the vein. *Id.*

12. *Locator can not oust co-tenant by posting new notice—Vested rights of associates.*—A mining custom which provides that any person who has discovered a vein or lode, and desires to locate a mining claim upon it for himself and others, may do so by putting up a notice, with his own name and the names of those whom he may choose to associate with him appended thereto, designating the extent of his claim, which may amount to 300 feet for himself and 150 feet for each of his associates, is a good and legal custom, but such discovery can not afterward deprive his associates of their interest by tearing down their names and substituting the names of others. *Morton v. Solambo Co.*, 463

13. *Location by agent.*—The law makes the discoverer the agent of those for whom he chose to act, and makes his act their act, regardless of whether they have any knowledge of it or not. *Id.*

14. *The word "location" construed.*—The word location, as found in the written laws of White Pine mining district, refers to the aggregate of ground claimed as a mine, and not to the interest of a single tenant in common, nor to any specific number of feet or section of the mine. *Leet v. John Dare Mining Co.*, 487

15. *Locating claims—Reasonable diligence.*—In the locating of ditches, a base line is generally first run to ascertain whether the water in the stream can be made to flow to the point where it is intended to be used. The line upon which the ditch is actually intended to be dug should afterward be run within a reasonable time, which must depend upon the circumstances of each particular case. *Parke v. Kilham*, 522

See ABANDONMENT, 1; APPROPRIATION, 5; CONVEYANCE, 4; DESCRIPTION, 5; DISCOVERY; DISTRICT RULES; EVIDENCE, 5; LODE.

LOCATION CERTIFICATE.

1. *Admission of paper title—Defective location certificate may be amended.*—When there is conflicting evidence touching the facts necessary to make valid the original location of a mining claim, the paper title of grantees claiming under the original locator will go to the jury. A location certificate which is fatally defective in omitting reference to natural

LOCATION CERTIFICATE. *Continued.*

object or permanent monument, may go to the jury in connection with an amended certificate correcting such defect. *Van Zandt v. Argentine Mining Co.*, 441

See RECORD, 1.

LODE.

1. *Vein—Cross seam—Division of lodes.*—Where a spar seam is found crossing a deposit (considering the character of such seams in the district where Treasure Hill is situate as a matter of notoriety), it does not constitute a division between lodes, even where it is shown that the rock behind the spar seam contains but little ore. *Phillpotts v. Blasdel*, 342

2. *Naming lode.*—Placing upon a lode a notice of location headed "Colfax Lode" is to christen it with that name. *Id.*

3. *A mass of ore underlying the debris* is not a lode such as may be followed on the dip beyond the surface lines, and the same is true where detached bodies of ore are found on the same "contact;" otherwise, if it be a continuous sheet of ore between defined boundaries of inclosing rock. *Leadville M. Co. v. Fitzgerald*, 380

4. *Void for excess of width.*—Where a location, otherwise valid, exceeds the width allowed by law, it is void as to the excess, but valid as to the extent allowed by law. *Jupiter M. Co. v. Bodie Co.*, 411

5. *Length and width of lode claims.*—The act of Congress of May 10, 1872, authorizes a claim to be located 1,500 feet in length along the vein, and, in the absence of any local rule or custom, the width of such claim may extend 300 feet on each side of the middle of the vein; but said act of Congress, by implication, authorizes the miners to limit the width of such claims to twenty-five feet on each side of the middle of the vein. *Id.*

6. *Definition of vein or lode.*—A vein or lode, authorized to be located, is a seam or fissure in the earth's crust, filled with quartz or some other kind of rock in place, carrying gold, silver or other valuable mineral deposits, named in the statute. It may be very thin or many feet thick or irregular in thickness; and it may be rich or poor, provided it contains any of the metals named in the statute. But it must be more than detached pieces of quartz or mere bunches of quartz not in place. *Id.*

7. *Lode in place defined.*—A vein or lode can not be in place unless it is within the general mass of the mountain. It must be inclosed by the general mass of fixed and immovable rock. If it comes to the surface and passes out from the rock in place, it ceases to be a lode. *Leadville M. Co. v. Fitzgerald*, 380

See APEX; CONVEYANCE, 4; DESCRIPTION, 5; DIP; DISCOVERY; LEDGE; LOCATION; LEASE, 7.

MANSLAUGHTER—See CRIMES, 7-9, 12-15.

MARRIED WOMEN.

1. *Separate estate of married woman—Notice to husband.*—In transactions relating to her separate estate a married woman is bound by notice to her husband only so far as he acts as her agent. *Chew v. Henrietta M. Co.*, 68

MASTER AND SERVANT—See CRIMES, 2, 6, 10.

MEASURE OF DAMAGES.

1. *Damnum absque injuria*.—The erection of a dam so as to flood junior claims above, held to be *damnum absque injuria*. *Stone v. Bum-pus*, 278

2. *Damage from mining above ditch head*.—A miner who works his claim above the head of a ditch previously located, so as to mingle mud and sediment with the water, and thus injures it for the use to which the ditch owner has applied it, or so as to fill up the ditch and reservoirs, thus lessening their capacity and increasing the expense of cleaning them, is liable for the damages thereby occasioned. *Hill v. Smith*, 597

3. *Special injury to water used by hydraulic*, on account of sediment, considered as an element of damage in action for filling ditch with debris. *Id.*

4. *Idem—Reasonable care no excuse*.—How carefully or cautiously the miner worked was a matter of no consequence, for if his work in fact injured the ditch owner, he was none the less liable to an action. *Id.*

5. *Dictum: Damnum absque injuria*.—The notion that, as between ditch owners and miners using the water of a stream in the mineral regions of the State for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior rights of the other, is without any substantial foundation. *Id.*

6. *Liability of ditch owner for overflow—Joint tort-feasors*.—The owner of a ditch, the waters of which were discharged at such a point that they naturally would and did overflow and injure the lands of another, can not shield himself from responsibility because he may have sold the water to miners, who used it for mining purposes, if the water was delivered to the miners at a point from which it would unavoidably run upon the land and result in the injury complained of. Though the miners may be joint tort-feasors, that does not affect the question of the ditch owner's liability. *Richardson v. Kier*, 613

See DITCH, 15; EQUITY; WATER, 20.

MECHANIC'S LIEN.

1. *Supplementary statute falls with repeal of original act*.—The act of 1850 gave a mechanic's lien only upon buildings and wharves. The act of 1853 extended the act of 1850 so as to include ditches, etc. The act of 1855 repealed the act of 1850. *Held*, the repeal carried with it the supplementary act of 1853, which extended the provisions of the original act. Without the original act, there was no mode of enforcing the supplementary act. The latter was so dependent upon the former as to become utterly inoperative upon the repeal. *Ellison v. Jackson Water Co.*, 559

2. *It is essential to the validity of such contract* that it, or some note or memorandum thereof be in writing, that it express a consideration and be subscribed by the party to be charged; and the consideration of the original contract did not attach to the promise made to a third party. *Id.*

See DITCH, 11.

MINE³—See DESCRIPTION, 9, 10, 11.

MORTGAGE.

1. *Purchase at foreclosure where company refuses or is unable to redeem.*—But where the company is insolvent or unwilling to pay or redeem after opportunity offered to all the stockholders to make advances and save the property a sale under the security in such case is valid. *Harts v. Brown*, 1

2. *Duplicate deed of trust—Ratification unnecessary.*—A deed of trust having been executed by authority of the directors of a corporation, and lost in transmission, a duplicate was executed. *Held*, that the duplicate was valid, and no ratification necessary. *Bassett v. Monte Christo Co.*, 108

3. *Trust deed by corporation with director as trustee.*—In a suit against a corporation to foreclose a trust deed, the stockholders can not object to the validity of the deed, because the trustee therein named is also a director in the corporation. *Id.*

See CORPORATION, 1-4.

NEGLIGENCE.

1. *Negligence defined.*—"Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but is always relative to some circumstances of time, place or person." *Richardson v. Kier*, 613

See DITCH, 13; WATER, 19.

NEW TRIAL.

1. *Surprise as a ground for new trial—Nonsuit.*—A motion for new trial will not be allowed on the ground of surprise, if ordinary prudence would have guarded against such surprise; besides, the plaintiff could have taken a nonsuit under § 148 of the Practice Act. *Brown v. Smith*, 539

2. *Newly discovered evidence as ground for new trial.*—A new trial will not be granted on the ground of newly discovered evidence, which consists of a deed recorded in the recorder's office twelve months prior to the trial, and a record of a judgment in the same court in which the cause was tried. *Weimer v. Lowery*, 543

3. *Statement on motion for new trial; how authenticated.*—No mode of authentication of a statement on motion for a new trial is pointed out by the statutes of California, but any satisfactory evidence in the record that the statement has been examined and approved by the judge, is sufficient. *Kidd v. Laird*, 571

4. *New trial—Diligence—Cumulative evidence.*—A new trial will not be granted if the affidavits of newly discovered evidence do not show that diligence was used to obtain it, nor if the evidence is cumulative. *Caruthers v. Pemberton*, 623

5. *New trial when judgment is contrary to evidence—Rule the same at law and in equity.*—If, upon appeal, a substantial conflict appears in

NEW TRIAL. *Continued.*

the testimony upon the issues, the judgment will be affirmed; but if not, and the evidence is against the judgment, it will be reversed and a new trial granted, and this rule applies as well at law as in equity. *Clark v. Willett*, 628

See PLEADING AND PRACTICE.

NOTICE.

1. *Effect of actual notice.*—In the absence of any miners' rule or regulation making recording a necessary act or condition of a complete location, or providing for a forfeiture by failure to record, a prior location of a mining claim, without recording the same, gives the locator thereof the exclusive right to possess and enjoy the same as against all persons having actual notice of such location and the extent thereof. *Jupiter M. Co. v. Bodie Co.*, 413

See DESCRIPTION, 4; DISCOVERY, 8-10; DISTRICT RULES, 17; TRUST, 3; LOCATION, 1.

NUGGET—See CRIMES, 18.

NUISANCE.

1. *Ditch wrongfully diverting water.*—An injury occasioned by the diversion of water is in the nature of a nuisance. To turn aside a useful element from the premises is as much a nuisance as to turn upon them a destructive element. *Parke v. Kilham*, 523

2. *Title in United States, and utility—No defense to nuisance.*—In an action to abate a nuisance, to wit, a ditch constructed across the land of another without his consent, it is not a good defense for the ditch claimants that the plaintiff has no title from the United States; that his inclosure is part of the public domain; nor can they set up in their answer as a defense the great cost of the undertaking, its great length, or its utility, or the fact that it is constructed for mining purposes. *Weimer v. Lowery*, 543

3. *No equitable relief to idle ditch.*—In a suit for damages by a ditch company and to abate as a nuisance two reservoirs constructed across the bed of the stream which supplied the ditch with water, by which the waters were collected and detained so as to prevent a regular flow in the ditch. *Held*, that testimony was properly admitted in defense, showing that the ditch had for a long time been out of repair and unfit for use and unused. *Held, also*, that the ditch company had only a right by prior appropriation to the use of the water in its natural flow; that other parties had a right to use it, so long as its use did not interfere with the rights of the ditch company, and that no action could be maintained to abate the reservoirs as a nuisance until the ditch was in condition to carry water. *Bear River Mining Co. v. Boles*, 593

See DAM, 1, 8.

OIL—See CRIMES, 22; DELIVERY, 1, 2.

PARTIES—See TENANTS IN COMMON, 3.

PARTNERSHIP.

1. *Partnership attempting to prove corporate organization.*—Where one of an association of persons, charged as partners, seeks relief from liability on the ground that such association is a corporation legally organized and doing a corporate business, the burden of proof rests on him to show the existence of such corporation. Failing to establish it, he can not avoid liability on the ground that he does not appear as a subscriber to the capital stock of such association. And the question in such case is not so much, whether such person has held himself out as a partner, but whether he was a member of the company, assuming to act as a corporation—holding himself out to the public, using his name and engaging in its transactions as such. *Abbott v. Omaha Co.*, 8

2. *Party to action—Day in court—New trial.*—In an action to foreclose a mechanic's lien against Hall and others, composing the firm of the San Gorgonio Fluming Co., a corporation answered and judgment was rendered against it. *Held*, that the corporation had never been made a party to the action, and had not had its day in court, and that a motion for new trial was erroneously denied. *Rousseau v. Hall*, 116

PATENT.

1. *Patent subject to vested water rights.*—A party who receives from the State a patent for land, takes subject to the vested and accrued water rights of others under the act of Congress. *Barnes v. Sabron*, 674

See STATUTE OF LIMITATIONS, 2.

PERSONAL LIABILITY—See CORPORATION.

PLACERS—See CORPORATIONS, 31.

PLEADING AND PRACTICE.

1. *Demurrer—Complaint qualified by exhibit.*—H., one of the defendants, demurred to a complaint which alleged that the defendants made and filed a report, a copy whereof is hereto annexed, and that defendants signed the report knowing it to be false. The annexed copy did not purport to be signed by H. *Held*, that by demurring, H. did not admit that he signed the report, but that the general averment in the complaint that defendants signed, was limited by the copy annexed to those who appeared by it to have signed. *Bunnell v. Griswold*, 16

2. *Facts, but not conclusions of law*, are admitted by a demurrer. *Id.*

3. *Allegations on information and belief.*—Under section 113 of the Practice Act the allegations of a complaint can be made on information and belief. *Flagstaff M. Co. v. Patrick*, 20

4. *Admissions by failure to plead over.*—In an action of trespass the declaration alleged ownership of the close; a demurrer to the defendant's plea in abatement was sustained and the defendant failed to plead further; *held*, that by this course the defendant admitted all the facts alleged in the declaration, and would not be permitted to prove in mitigation of

PLEADING AND PRACTICE. *Continued.*

damages an entry under color of title, or to interpose any substantive defense. *Utley v. Clark-Gardner Co.*, 39

5. *Special proceedings*.—Under § 76, Code of Civil Procedure, courts are always open to hear special proceedings of a civil nature. *Stewart v. Mahoney Co.*, 106

6. *An objection not made in the court below will not be considered.* *Bassett v. Monte Christo Co.* 108

7. *Error in instructions*.—Where a case is tried under a misapprehension of the law, the judgment below must be reversed. *Farnum v. United States*, 192

8. *Error without prejudice*.—A cause will not be reversed for the admission of irrelevant testimony, if it appears that the appellant was not prejudiced thereby. *State v. Berryman*, 119

9. *Demurrer to evidence—Judgment*.—Defendants demurred to the evidence, and the Commonwealth having joined therein, the court discharged the jury and gave judgment for the Commonwealth on the demurrer. *Held*, that this was not erroneous. *Hutchison v. Commonwealth*, 209

10. *Writs of error and certiorari are of right*.—Under the provisions of the act of 19th May, 1874, in all cases of felonious homicide and such other criminal cases as are triable exclusively in the oyer and terminer, writs of error and *certiorari* are of right, and in all other cases may be issued whenever allowed by the Supreme Court or a judge thereof. *Id.*

11. *Proof of title*.—A defendant who denies that the plaintiff is the owner of a mining claim may overcome the plaintiff's evidence of title by proving title in himself whether he has or has not alleged title in himself. *Stone v. Bumpus*, 272

12. *Defective complaint*.—A complaint in which damages are claimed for the obstruction of the flow of water and tailings in a cañon is radically defective if it fails to allege that plaintiffs are entitled to the use of the cañon to convey away such water and tailings. *Id.*

13. *Cross-examination*.—Where, upon the trial, the commissioner appointed by agreement to report the quantity of coal mined by the defendant, had produced and identified his report, having been called for that purpose only, he could have been cross-examined by the defendant as to its identity, but not as to the basis on which it was made; to obtain evidence of the contents of the paper, the defendant should have called the witness in chief. *Tiley v. Moyers*, 321

14. *Order granting new trial, when reversed*.—It is not enough to authorize the appellate court to reverse an order granting a new trial, that the evidence appears fully to support the verdict. It will only be reversed for the most cogent reasons. *Phillpotts v. Blasdell*, 342

15. *Amendment at the hearing*.—Plaintiff having declared for the entire property, it was developed on the trial that in consequence of a defective deed he had title to only two thirds of the claim. *Held*, that plaintiff could not, on this declaration, recover for two thirds, and that the person holding title to the other third of the claim might not, without his consent, be joined as party plaintiff, yet plaintiff might amend

PLEADING AND PRACTICE. *Continued.*

his complaint so as to demand but two thirds. *Van Zandt v. Argentine Co.*, 441

16. *Mistake of counsel no ground for new trial.*—The mistake of counsel as to the competency of a witness, is no ground for granting a motion for new trial. *Packer v. Heaton*, 447

17. *Objections to transcript made too late.*—It is too late to make technical objections to a transcript after the case is submitted upon its merits, even though such submission is made prior to the day on which the case was set for argument. *St. John v. Kidd*, 454

18. *Exception taken after jury has retired.*—Exceptions to instructions taken after the jury has withdrawn to consider the verdict, but before the verdict is rendered, may be either allowed or refused, in the discretion of the court, and no error committed. *Id.*

19. *Facts assumed in instructions, when no error.*—It is no ground for error that an instruction assumed that the defendant was the agent of the E. M. Co., even though the evidence did not fully warrant such assumption, provided it was not productive of any injury to plaintiffs. (Per SPRAGUE, J., dissenting.) *Bradley v. Lee*, 470

20. *Erroneous assumption in instructions.*—An instruction which assumes, as a fact established, one of the issues tendered by the pleadings, or which assumes that an outstanding title in a stranger will defeat plaintiff's right to recover possession of a mining claim, is erroneous. *Id.*

21. *Contradictory instructions.*—An instruction which seems to submit to the jury the construction of a custom which, in a previous instruction, had been construed by the court, tends to nullify the construction of the court and to confuse the jury. *Id.*

22. *Instructions to the jury are to be read together.*—An instruction given for the purpose of presenting the law upon a point arising upon more than one fact seldom contains all the qualifications that would be necessary if no other instruction were given; but it is always intended that such instruction shall be read together with the other instructions upon the same point. *Bradley v. Lee*, 470

23. *Affidavits required upon extraneous errors.*—The Supreme Court of Montana will not consider errors assigned for irregularity in the proceedings of the court, and accident and surprise, unless supported by affidavits, as required by § 234 of the Practice Act. *Orr v. Haskell*, 492

24. *New trial—Verdict against evidence.*—It must be clear that the jury has erred before a new trial will be granted on the ground that the verdict is against the weight of the evidence or unsupported by it. *Id.*

25. *Objection to sufficiency of answer after verdict.*—An objection that the answer is insufficient to form an issue, comes too late when made for the first time after verdict. *Id.*

26. *Improper testimony—Error without prejudice.*—The admission of improper testimony is no ground for disturbing a verdict where it is evident that no injury has been done. *Priest v. Union Canal Co.*, 515

27. *Discretion of court in supplying omission.*—A court may, in the exercise of a sound discretion, permit a party, at any time before the case

PLEADING AND PRACTICE. *Continued.*

is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence. *Id.*

28. *Verdict against evidence—Conflicting testimony.*—The Supreme Court will not disturb a verdict on the ground that it is against the evidence, when the testimony is conflicting. *White v. Todd's Valley W. Co.*, 537

29. *Verdict of jury.*—In an action for the diversion of water, the Supreme Court will require a case of very palpable mistake or error to be made out, before it will overrule the verdict of the jury on issue of fact joined. *Brown v. Smith*, 539

30. *Form of denial.*—Any form of denial which meets and traverses the allegation, is admissible. If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed. *Hill v. Smith*, 597

31. *No admission by failure to reply—Error without prejudice.*—It is error to instruct the jury that plaintiffs admit the allegations of defendant's answer by failure to file a replication; but when the allegations in the answer are also proved upon the trial, such instruction does not prejudice the plaintiffs' case. *Caruthers v. Pemberton*, 622

32. *Averments in complaint in suit for damages for sale of canal.*—In an action for damages for the sale of plaintiffs' interest in a canal and flume under a judgment which was afterward reversed by the Supreme Court of the United States, the complaint did not contain any direct averment that the canal and flume were ever constructed. *Held*, that this fact sufficiently appeared by necessary inference, and that it is not ordinarily necessary to aver the existence of the subject-matter about which litigation arises. *Reynolds v. Hosmer*, 657

33. *Reversal of judgment operates ipso facto upon lower court.*—When the Supreme Court reverses the judgment of the lower court, and its mandate to that effect is filed in the lower court, the judgment is reversed, whether the lower court makes an order conforming its judgment to that of the higher court or not. *Id.*

34. *Demurrer to complaint for uncertainty.*—A complaint, defective because it fails to show in whom is the title to the subject-matter in controversy, can not be reached by general demurrer; it should be attacked by special demurrer. *Id.*

35. *Findings construed.*—The findings of fact by the court are like a special verdict of a jury, and must be taken in connection with the pleadings to support the judgment; they can not be detached from each other, but must be read together for the purpose of ascertaining their meaning, and if there is any conflict or discrepancy between general and special findings, the specific findings must control. *Barnes v. Sabron*, 675

36. *Order refusing new trial reviewed.*—Upon application for a new trial, as provided by the Practice Act, the court is authorized to decide whether the findings sustain the judgment, and its action can properly be reviewed by the Supreme Court on appeal from an order overruling the motion for new trial. *Id.*

See AMENDMENT; NEW TRIAL; PARTNERSHIP, 2; TENANTS IN COMMON, 2; VERDICT.

POSSESSION.

1. *Title by possession before discovery of mineral in place.*—A prospector on the public mineral domain may protect himself in the possession of his claim while he is searching for mineral; but if he allows another to enter upon his claim, and first discover mineral in rock in place, the second comer will have the better title to the mineral. *Crossman v. Pendry*, 431

2. *Constructive possession, how proved.*—A party claiming mining ground not actually possessed and worked, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works or monuments, or by the local mining laws and rules, and compliance therewith. *Robert v. Wilson*, 498

3. *Possession of cultivated land not fenced.*—The plaintiff was held to be entitled to the use of the water of a certain creek for the purpose of irrigating the land which he had under cultivation, though not fenced, as well as for his stock and domestic purposes. Cultivation of land is an indication of possession, whether inclosed or not. *Barnes v. Sabron*, 674

4. *A party in possession, under a contract of purchase from the State*, is entitled to all the incidents and protection due to ownership. *Id.*

See AGENT, 1; DISCOVERY, 8; EJECTMENT, 2; INJUNCTION, 2, 6; RELOCATION, 2.

PRESCRIPTION—See CUSTOM.

RAILROADS.

1. *U. S. grants to Pacific R. R.*—The Pacific railroad companies take the lands granted to them by the acts of Congress of 1862 and 1864, subject to ditch rights vested prior to the Mining Act of July 26, 1866, where, under the provisional terms of those grants, the equity of the grantee had not vested; and such equity did not vest before the certificate called for in the acts had been made by commissioners as to the completion of each section of forty miles. *Broder v. Natoma Mining Co.*, 671

RATIFICATION.

1. *Unconscionable arrangement enforced.*—An unconscionable arrangement will not be disturbed when there has been a ratification of it with knowledge of all its bearings, after time has been had for consideration. *Kent v. Quicksilver M. Co.*, 48

RECORD.

1. *Object and effect of record.*—The object of recording mining claims is to give notice to others desiring to locate in the vicinity. The language of the act of Congress authorizing miners to make regulations "governing the location and manner of recording," implies that the act of location is distinct from that of recording, except where the regulations of miners make recording necessary to constitute a location; so that a location may be complete and vest the exclusive right of possession before any record thereof is made, unless recording is made an act of location, or one of the acts necessary to constitute a location, by miners' rules or regulations. *Jupiter Co. v. Bodie v. Co.*, 413

RECORD. *Continued.*

2. *Forfeiture by failure to record.*—The right to a mining claim will not be forfeited by a failure to record the same, in the absence of a miners' rule or regulation providing for a forfeiture on that ground. *Id.*

See STATUTE OF LIMITATIONS, 1; NOTICE.

RECOUPMENT—See LEASE, 3, 6.

RELATION—See APPROPRIATION, 13; DILIGENCE.

RELOCATION.

1. *Conveyance.*—There is no law to prevent a party from relocating his own claim by a different name, and, though he can not thus acquire any more ground, a conveyance by the latter name will be valid. *Phillipps v. Blasdell*, 342

2. *Relocation while in possession of others—Instruction construed.*—An instruction of the court below directed the jury to find for the defendant if they believed that the E. M. Co. located the claims "at a time when they were open and subject to appropriation under the local usage of the district." *Held*, that this instruction did not imply that a relocation based upon a failure to perform work under such local rules, could be made while a party was in actual possession of the claim. Per SPRAGUE, J., dissenting. *Bradley v. Lee*, 470

RENTS AND ROYALTIES—See LEASE; CONTRACT, 3.

RESERVATION.

1. *Loose rock reserved.*—When the words of grant carry only rock in place the exception of the loose rock is simply inoperative. *Dexter Lime Co. v. Dexter*, 291

RIOTS—See CRIMES, 4.

STATUTES—See MECHANIC'S LIEN, 1.

STATUTE OF FRAUDS.

1. *Ditch contract—Promise to pay the debt of another.*—E. contracted to build an extension to a ditch upon which a mortgage existed. After work commenced, the holder of the mortgage instituted a foreclosure suit, whereupon E. refused to complete the extension. The holder of the mortgage then orally promised E. that he should be paid out of the receipts for the sale of water by the receiver, E. having originally agreed to be paid out of the proceeds of sales. Under this promise, E. completed the work. *Held*, that the contract was within the Statute of Frauds, as a promise to pay the debt of another. *Ellison v. Jackson Water Co.*, 559

STATUTE OF LIMITATIONS.

1. *Runs after debt matures—Record of trust deed—Third parties.*—A suit to foreclose a trust deed was begun more than four years (the period of limitation) after the date of the deed but less than four years after the

STATUTE OF LIMITATIONS. *Continued.*

maturity of the bonds which it was given to secure. *Held*, that the action was not barred by the statute, and that the record of the deed secured the mortgagee against a subsequent incumbrancer to the same extent as against the mortgagor. *Bassett v. Monte Christo Co.*, 108

2. *Statute of Limitations against patent*.—Where plaintiff claimed title by Mexican grant confirmed by act of Congress and patent founded thereon. *Held*, that evidence of adverse possession in defendants prior to the date of plaintiff's patent was properly excluded, because the Statute of Limitations only began to run at that date. *Reed v. Spicer*. 330

3. *Adverse possession of water*.—Although the plaintiffs may have had the prior right to water, yet if they or their grantors allowed the defendant to acquire and hold for five years adverse possession of the water which they had appropriated, or any part thereof, they, to that extent, lost their right by force of the statute. *Davis v. Gale*, 604

STOCKHOLDER—See ESTOPPEL, 1, 2.

STRIKE—See CRIMES, 3.

SURFACE SUPPORT.

1. *Right of surface support*.—Whether the general rule giving to the surface of land the right to surface support applies to the case of a ditch, *Quære*. *Clark v. Willett*, 629

TAILINGS.

1. *Use of channel*.—A miner is entitled to the free use of a channel of a creek, to allow the water which comes down from above to flow away from his mining ground, but he has no right to fill the channel of the creek with tailings and debris, and let it flow down upon another's ground. —*Nelson v. O'Neal*, 275

See DAM, 9; MEASURE OF DAMAGES, 3, 4.

TAX.

1. *Annual payments, not annual profits*.—Payments of purchase money by annual payments are not annuities, annual profits or gains—under the income tax acts. *Foley v. Fletcher*, 130
See DESCRIPTION, 8.

TENANTS IN COMMON.

1. *Sale by tenants in common to tenants in common*.—H. and P. were tenants in common of a mining ditch. H. conveyed all his interest to defendant, and P. all his interest to plaintiff by a deed of later date. *Held*, that neither of the grantors could be considered as having conveyed against the will of the other, and that their grantees, the plaintiff and defendant, became tenants in common. *Reed v. Spicer*, 330

2. *Joinder of co-tenants*.—In an action for diverting water by ditch, tenants in common should be joined. It would be error for them to sue separately. *Parke v. Kilham*, 523

TENANTS IN COMMON. *Continued.*

3. *Tenancy in common presumed—Parties.*—The averment that the plaintiffs owned seven tenths of the canal, raises the legal presumption that they owned it as tenants in common, and in California tenants in common may sue jointly, or if one be dead his administrator may join with the other tenants. *Reynolds v. Hosmer*, 658
See EVIDENCE, 3; LOCATION, 12.

TIME—See CONTRACT, 6.

TRESPASS—See CRIMES, 20; LOCATION, 9.

TRUST.

1. *Fiduciary purchasing at his own sale, after bidding off parcels sufficient to pay debt.*—When after sufficient parcels had been sold under a trust deed to pay the debt secured, the remaining parcels were knocked off at the same sale and bid in by the creditor, a director in the company. *Held*, that the sale of such parcels in excess was void because as to such property the directors were the vendors and they could not purchase at a sale made by their own authority. *Harts v. Broton*, 1
2. *Subrogation in such case.*—In such case where the receipts in excess of the debt secured, were used to pay off *bona fide* debts of the company, the parties paying such debts were entitled to be subrogated to the rights of the creditors paid, and such amounts allowed to them; but upon an accounting they should be charged with the full value of such parcels instead of the amount of the bids. *Id.*
3. *Cestui que trust—Notice to trustee.*—Notice to a trustee is not notice to the *cestui que trust*, where the trustee has no official relation to the transaction in controversy. *Chew v. Henrietta Co.*, 69
See CORPORATIONS, 1-4, 11.

TRUST DEED—See MORTGAGE.

USAGE—See DISTRICT RULES.

VENDOR'S LIEN—See LIEN.

VENDOR AND PURCHASER—See LEASE.

VERDICT.

1. *Distinct defenses.*—If a general verdict is found for the defendants in a suit in which there are several distinct defenses, the verdict will be allowed to stand if it be right as to one, though wrong as to all the others. *Kidd v. Laird*, 573
2. *Conclusiveness of verdict.*—A verdict found on any fact or title, distinctly put in issue, is conclusive in another action between the same parties or their privies in respect of the same fact or title. It is not sufficient that the particular fact or title is put in issue. It must be tried by the jury, and constitute the basis and foundation of the verdict. *Id.*
3. *General verdict.*—A general verdict is limited in its effect to such issues as necessarily controlled the action of the jury. *Id.*

VERDICT. *Continued.*

4. *Practice—Verdict and judgment not disturbed.*—Courts will not disturb a verdict where there is evidence to support it, or reverse a judgment where, from the whole record, justice appears to have been done.

Caruthers v. Pemberton, 623

5. *Verdict set aside—Want of diligence.*—Due diligence is a question for the jury, but the term is sufficiently well defined to justify a court in setting the verdict aside, when, upon an admitted state of facts, there appears an utter want of diligence. *Ophir Mining Co. v. Carpenter,* 640

WARRANTY.

1. *Personal liability where title fails to pass.*—And it was further held, that the articles did not prevail against a deed to a stranger, though the maker was personally liable on the articles to make good his privilege.

Snodgrass v. Ward, 306

WATER.

1. *Detention exercised with reference to rights of lower proprietors.*—The right to use necessarily implies the right to detain, not to divert, the water; and this detention must be reasonable, and be exercised with reference to and in aid of the grant made to the lower mill. *Oregon Iron Co. v. Trullenger,* 247

2. *Surplus water—Subsequent appropriators.*—Subsequent locators may appropriate the surplus waters of a stream left after a prior appropriation, and when the rights of such subsequent appropriators once attach, the prior appropriator can not encroach upon them by extending his appropriation; nor can he enlarge his ditch or dam so as to retain what he originally appropriated, if through intervening accidents (as the filling of the stream-bed with tailings) such enlargement would interfere with such intervening rights. In such a case when a right has once vested in the subsequent appropriator, the prior appropriator would be no more justified in extending his claim or changing the means of appropriation, to the prejudice of the second appropriator, than the latter would be in encroaching upon the prior rights of the first. *Nevada Water Co. v. Ponce,* 254

3. *Necessity of water.*—The loss of its water may be equivalent to the destruction of all value to the claim. *Jennison v. Kirk,* 505

4. *Sufficiency of complaint to admit of proof of diversion.*—A complaint alleged that "plaintiffs are entitled, by virtue of prior appropriation, to all the water flowing in the cañon at the head of their ditch, and that defendants diverted the water to their damage": Held, that it was not necessary to state whether the water was supplied at that point by one or more streams, in order to admit proof of a diversion of water from above the ditch. *Priest v. Union Canal Co.,* 515

5. *Diminution of water supply.*—The first appropriator of water by means of a ditch is entitled to have the water flow, without material interruption in its natural channel, so undiminished in quantity as to leave sufficient to fill his ditch as it existed at the time the later locations were made above. *Bear River & A. W. Co. v. New York M. Co.,* 526

6. *Deterioration in quality of water.*—The deterioration in the quality

WATER. *Continued.*

of the water in the ditch by means of its use for mining purposes above, should be considered as an injury without consequent damage. *Id.*

7. *Reclamation after flowing back into natural stream—Mingling waters.*—V. turned certain water which he had appropriated into a natural ravine, whence it flowed into Jackson creek, and mingled with the waters of that stream, but after descending about a mile was again taken up at a point above the Butte Co.'s claim and diverted by V. to his mining claim. The Butte Co. brought suit for diversion: *Held*, that the prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. *Held, further*, that the water introduced by V. did not necessarily become subject to the use of the Butte Co., because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties after such mingling are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity. *Butte Canal Co. v. Vaughn*, 552

8. *Rights to running water.*—Running water, so long as it continues to flow in its natural course, can not be made the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but this right carries with it no specific property in the water itself. *Kidd v. Laird*, 571

9. *Property or right.*—The owner of a ditch has exclusive and absolute power of control over and right of enjoyment in the water running in his ditch, whether the water is or is not, in a strict legal sense, his private property. *Id.*

10. *Right to change point of diversion.*—A party entitled to divert a given quantity of water from a stream, may exercise the right at any point on the stream and may change the point of diversion at pleasure, provided he does not injuriously affect the rights of others. *Id.*

11. *Change of ditch head.*—A person who has appropriated a given quantity of water from a stream has not an absolute and unqualified right to change the point of diversion, but he may change it at pleasure, provided the rights of intervening locators be not injuriously affected. *Butte T. M. Co. v. Morgan*, 583

12. *Illegal diversion of water prevented by use of force.*—The plaintiff attempted to divert water from a stream at a point above defendants' dam, and the defendants ejected the plaintiff from the premises. *Held*, that as the diversion would have been illegal, the defendants adopted a legitimate mode of averting the injury. *Id.*

13. *Common law controlled by conditions.*—The *reasons* which constitute the groundwork of the common law upon the subject of water rights, remain undisturbed. The conditions to which courts are called upon to apply them are changed, and not the rules themselves. The maxim *sic utere tuo ut alienum non lædas*, has lost none of its governing force. *Hill v. Smith*. 597

14. *Maxims* controlling the relative rights of miners and ditch owners and of prior and later appropriators. *Id.*

WATER. *Continued.*

15. *Test of injury to water rights.*—The question of injury to water rights by diminution or deterioration, must be determined in view of the use to which the water is applied, in connection with other circumstances. The question is, has the enjoyment of the water for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant. *Id.*

16. *Water turned into stream by strangers.*—If the volume of water in a stream is increased by the acts of third parties, without any intention of recapture by them, such increase becomes *publici juris*, and the relative rights of appropriators along the stream remain the same as before. The case is not different from an increase from natural causes. *Davis v. Gale*, 605

17. *Rights by adverse possession, when not prejudiced.*—One who has adverse possession of water as against the prior appropriator, does not prejudice his right by the fact that he allows a certain quantity of water to run down to miners at work below. Such an act is no concession to the prior appropriator. *Id.*

18. *Relief in equity for disputed water rights.*—When two parties each claim the prior right to the use of water for mining purposes, equity seems to be the only appropriate remedy to afford relief. *Barkley v. Tieleke*, 666

19. *Damages for diverting water—Contributory negligence.*—If a man is deprived of three fourths of the water he is entitled to by the wrongful act of another, it is no defense to an action for damages that he has allowed a portion of the remaining fourth to run to waste. The doctrine of contributory negligence has no application to such a case. *Barnes v. Sabron*, 675

20. *Nominal damages—Decree fixing amount of water party is entitled to.*—Defendants diverted water from plaintiff's crops, claiming to have the better right thereto. *Held*, that though plaintiff suffered no actual damage, yet the diversion might by lapse of time ripen into a prescriptive right, and for this reason plaintiff was entitled to recover nominal damages, and to an equitable decree declaring the amount of water to which he was entitled. *Id.*

See APPROPRIATION; CONTRACT, 9, 10; DAM; DITCH; ESTOPPEL, 5; PATENT, 1; STATUTE OF LIMITATIONS, 3.

WATER COURSE.

1. *Natural water course—Sinking stream.*—A stream in Nevada supplied at seasons from springs, but mostly from the melting snow on the mountains, having no regularity as to quantity of water from season to season, and at certain places at certain seasons having sinks, where the water disappears beneath the surface, leaving, however, a distinct channel, with bed and banks, is a natural water course—a "flowing stream of water"; a water course as distinguished from water flowing through ravines only in times of freshet; and it need not appear that it is water flowing continuously. *Barnes v. Sabron*, 674

WEIGHTS AND MEASURES.

1. *Measurement of capacity of ditch.*—The amount of water appropriated by a ditch should be estimated by measuring it according to miners' measurement, near the head of the ditch, when it is full, or conveying all it has capacity to. *Caruthers v. Pemberton*, 622

See APPROPRIATION, 13, 16; CONTRACT, 1; DITCH, 9, 19, 20.

WITNESS.

1. *Interest of witness.*—In a suit to recover a mining claim which had been conveyed to the plaintiff by quitclaim deed, an objection that the plaintiff's grantor is an incompetent witness on the ground of interest, is not well taken. *Johnson v. Parks*, 316

2. *Interest of witness.*—One of a company of miners suing for possession of a claim, who has sold his interest before suit, but after the location of the claim sought to be recovered, is interested in the damages claimed and is not a competent witness. *Packer v. Heaton*, 447

3. *Interested witness—Waiver.*—An objection to the testimony of a witness on the ground of interest should be made as soon as it appears that he is interested, and a failure to do so then is a waiver of the objection. *Bear River Mining Co. v. Boles*, 592

WORKINGS—See CUSTOM, 7.

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